Water – Montana's Treasure

An analysis of water management in Montana

A report to the 61st Montana Legislature
by the Water Policy Interim Committee
Prepared by Joe Kolman

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A Report to the 61st Legislature
September 2008

House Bill No. 304 Study
Water Policy Interim Committee

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This report is a summary of the work of the Water Policy Interim Committee. Volumes of information were presented to and reviewed by committee members. Some of that information is referenced here or included in the appendixes. All of the information, including written minutes and, in some cases, audio minutes, is available on the WPIC web site: http://leg.mt.gov/water

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Introduction

It is easy to lend mythical status to Montana's waters. From the Bitterroot to the Yellowstone and all the water in between, Montana's rivers, creeks, lakes, and man-made reservoirs play a significant role in the state's history. We are as connected to the water that cuts between our mountains and through our prairies as we are to the land itself.

Because of that relationship, it is difficult to overstate the importance of water to the Treasure State. We depend on water for irrigating crops, quenching the thirst of residents and livestock, enabling industry, generating power, preserving fish and wildlife habitat, and providing a myriad of recreational opportunities.

Water—mostly its quantity and quality—is a biennial topic of debate among legislators. But it has been more than a decade since the Legislature convened an interim committee to specifically examine water policy.

The creation of the Water Policy Interim Committee was the result of several things coming to a head between 2005 and 2007.

In 2005, the Legislature approved a measure to rejuvenate water rights adjudication—the judicial process of decreeing the quantity and priority date of existing water rights in a basin.[1] That historic usage is vital for Montana to defend its use in the face of demands from other states and Canada. Final decrees also are key to settling disputes between Montana water users.

In 2005, the Legislature approved a measure to rejuvenate water rights adjudication—the judicial process of decreeing the quantity and priority date of existing water rights in a basin.

In 2006, the state Supreme Court ruled that the use of ground water wells in the Smith River Basin was affecting senior water rights holders on the river, and the system of permitting used by the state failed to recognize the connection of ground water and surface water. To address that situation, the 2007

[1] As passed in 2005, House Bill No. 22 imposed a fee on every water right in the state. Water right claims as well as provisional permits and certificates granted in the new appropriations process were required to pay the fee until the statute terminated in 2015. However, the 2007 Legislature repealed the fee provisions of HB22 and transferred $25 million in general fund revenue to the water adjudication account to replace fee revenue and keep the process on the 2015 timeline.

Legislature passed House Bill No. 831 regulating ground water appropriations in closed basins, those areas deemed off limits to some new water use permits because of overappropriation. In general, the new law requires mitigation for a new use of ground water that adversely affects a senior water right holder.

WPIC tour of the Gallatin Valley.
Photo by Cynthia Peterson.

These circumstances set the stage for the passage of House Bill No. 304, which created the Water Policy Interim Committee (WPIC). The committee was charged with studying a wide range of water issues in order to guide Montana's water policy toward ensuring fair and reasonable use of Montana's water resources as demands on water increase while supplies remain the same or decrease.

The tasks assigned to the committee and a brief summary of the WPIC responses are included in **Appendix A.**

The committee met 10 times over the interim and ventured into closed basins to hear comments from some of the Montanans most affected by water management policies. In addition to Helena meetings, the WPIC held meetings in Dillon, Bozeman, Thompson Falls, Choteau, and Hamilton.

WPIC Findings and Recommendations

Introduction

The findings below relate to the study tasks assigned to the Water Policy Interim Committee as well as other issues examined by the committee.

Water Policy

1. Finding: The continued and expanded study of ground water resources is vital to shaping statewide policy as well as providing the data necessary for local decisions regarding water.

A. **Recommendation**: Support appropriation of $4.2 million to the Montana Bureau of Mines and Geology (MBMG) to produce hydrogeologic models for subbasins.

2. Finding: Water is one of Montana's most important natural resources and is vital to economic development, agriculture, recreation, wildlife habitat, and the high quality of life experienced by residents and visitors.
3. Finding: Water policy is a complex subject not easily understood in a short time.
4. Finding: The state water plan is outdated and does not reflect recent court decisions and legislation. There is a need to set out a progressive program for the conservation, development, and utilization of the state's water resources and propose the most effective means by which these water resources may be applied for the benefit of the people, with due consideration of alternative uses and combinations of uses.
5. Finding: The Legislature is responsible to the citizens of Montana to provide continuous and comprehensive water planning. The Legislature should play a key role in crafting Montana water policy and overseeing the implementation of those policies.

A. **Recommendation:** Make the WPIC a permanent interim committee.

General Water Quantity & Quality

1. Finding: The Controlled Ground Water Area (CGWA) statutes need revision.
2. Finding: The petitions for CGWA could help guide MBMG studies.
3. Finding: To comply with the federal Clean Water Act, the Montana Department of Transportation (MDT) must obtain federal wetland credits when a highway project affects an existing wetland.

4. Finding: A clear mechanism is needed for MDT to establish a water right to protect wetlands.

A. **Recommendation:** Create a certificate of water right for aquatic resource activities carried out by the MDT in compliance with and as required by the federal Clean Water Act.

5. Finding: Water quality is a concern in closed basins as well as statewide.
6. Finding: Current law requires that aquifer recharge plans utilizing sewage must obtain discharge permits.

A. **Recommendation:** Require discharge permits for mitigation and aquifer recharge plan, if necessary.

7. Finding: There is a need for a statewide hydrogeologic study. Such a study could provide baseline data for local studies, such as the Ruby Valley analysis, that would provide planning and decisionmaking information.

A. **Recommendation:** Support appropriation of $4.2 million to the Montana Bureau of Mines and Geology to produce hydrogeologic models for subbasins.

Government Issues

1. Finding: The Department of Natural Resources and Conservation (DNRC) averages 245 days to issue a water right, based on a 6-year average.
2. Finding: Permit applications in closed basins generally take the most time to evaluate. The passage of House Bill No. 831 made evaluating those applications more complex.
3. Finding: Permitting in closed basins as well as statewide should be easier to understand and more timely.

A. **Recommendation:** Require notice of receipt of applications, allow DNRC, the applicant, and affected parties to meet informally on a permit application, require a preliminary determination and set timelines.

4. Finding: Subdivisions have 60 days to be approved by the Department of Environmental Quality (DEQ) if there are no denials. Over the last 5 years, 25 percent were approved in 60 days, 28 percent within 120 days and 18 percent within 180 days.
5. Finding: Both DEQ and DNRC express a desire and willingness to work with each other.

A. **Recommendation:** The DEQ and the DNRC should continue to coordinate efforts regarding water issues.

6. Finding: Not all exempt wells are reported to DNRC. There appears to be discrepancy between the number of wells reported to DNRC and the MBMG and the number of subdivision lots with exempt wells recorded by the DEQ.
7. Finding: The DNRC is coordinating with other agencies to improve exempt well tracking and will start requiring more information on the notice of completion, including flow rate and volume.

A. **Recommendation:** The agencies should continue working to increase the accuracy of exempt well reporting.

Water Use Enforcement

1. Finding: The DNRC does not have a system in place to enforce statutory limits on exempt wells.
2. Finding: While the DNRC does have statutory authority to investigate illegal water use—and does exercise that authority—there are concerns that senior water rights are not being protected.
3. Finding: There are several options available to water users to resolve conflicts, including mediation, filing for court action, and, in some areas, petitioning for a water commissioner.
4. Finding: The DNRC and county attorneys have limited resources to investigate and prosecute illegal water use.
5. Finding: As stated in the Constitution, the waters of Montana belong to the state for the use of its people. The use of those waters is a private property right.

A. **Recommendation:** When requested by a district court and approved by the chief water judge, water masters may serve as special masters in certain water disputes.
B. **Recommendation:** When enforcing water law, priority should be given to protecting the rights of senior users. The DNRC may attempt to obtain voluntary compliance, but the Attorney General and the county attorney do not need to attempt to obtain compliance and they may act independent of a request by the DNRC.

6. Finding: The statewide adjudication of water rights with enforceable decrees is a major component of water right enforcement that will allow water commissioners to distribute water by priority date.
7. Finding: New requirements for enforcement of water rights must be accompanied by adequate resources and should not take precedence over the continued adjudication of water rights.

Water Supply & Sewage Disposal

1. Finding: Current law does not require a permit for a well with a maximum appropriation of 35 gallons per minute (GPM) or less, not to exceed 10 acre-feet a year, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. As defined by administrative rule, a combined appropriation is "an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system."
2. Finding: The use of individual water wells exempt from permitting and individual septic systems is appropriate in many parts of Montana and the use of public water and sewer systems is not always feasible, practical, or affordable.
3. Finding: Statewide, the DNRC estimates that exempt wells, including stock and domestic wells, represent less than 5 percent of total consumption.
4. Finding: In some areas, particularly those in closed basins that are experiencing population growth, there are concerns about the effect of exempt wells on water quantity and the effect of individual septic systems on water quality.
5. Finding: DNRC records show 38,372 exempt well certificates since 1991 when the 35 gpm, 10 acre-feet a year limit was implemented.
6. Finding: DNRC estimates that by 2020, there could be between 32,000 and 78,000 additional exempt wells.
7. Finding: Not all exempt wells are filed with the DNRC. For those that are filed, the DNRC does not meter whether or not the wells are exceeding the allowed rate or volume.
8. Finding: DNRC records show that there are thousands of purposes listed for wells. Some of the most common include domestic (75%), stock watering (32%), lawn and garden (24%), irrigation (6.5%), commercial (2.6%), multiple domestic (1.9%), and fish, waterfowl wildlife, recreation-related purposes (1.7%).
9. Finding: Domestic and multiple domestic purposes automatically include one-quarter acre of lawn irrigation per household. Therefore, when the purpose "lawn and garden or irrigation" appears on the certificate, it is for more than one-quarter acre of irrigated area.
10. Finding: For DEQ subdivision review, the average in-house diversion is about .22 acre-feet per year and much of that is nonconsumptive. Based on an 18-week irrigation season, a quarter-acre lawn takes .55 acre-feet annually.
11. Finding: According to the DNRC, the limiting factor to irrigation from an exempt well would probably be the annual volume, not the rate. It may be possible to irrigate 4 acres with an exempt well; enough to feed three horses.
12. Finding: Exempt wells in Colorado are 15 gpm for up to 1 acre of irrigation; Idaho is 18 gpm for 1/2 acre; North Dakota 7.6 gpm up to 12.5 acre-feet a year for 1 acre; and Wyoming is 25 gpm for up to 1 acre.

13. Finding: The water right permitting process for a public system may take longer and be more expensive for a subdivision than using exempt wells.
14. Finding: There is a need to address public health issues in areas where there is an increasing density of single wells and septic systems.
15. Finding: In some areas of Montana, public water systems and public sewer systems are preferable to individual water wells and septic systems. But installing public water and sewer systems at the time of development may represent a significant cost to the developer, which is passed on to the homeowner.
16. Finding: While individual water wells may cost less per lot initially, over time a public water system may result in less cost to the homeowner.
17. Finding: The WPIC studied several issues related to exempt wells and septic systems and sought input from the development community as well as the local governments, DEQ, DNRC and the Department of Fish, Wildlife, and Parks (FWP). The committee finds that incentives are needed to encourage public water and sewer systems.
18. Finding: There are several existing programs that provide grants and loans to water and wastewater projects; however, most are aimed at repairing existing systems.
19. Finding: The INTERCAP Loan Program is available for water and sewer projects. The variable-rate loan must be repaid within 15 years or the useful life of the project, whichever is less. Over the last decade the average interest rate has been 4.1%.
20. Finding: The Renewable Resource Loan Program has historically provided loans for municipal water and wastewater projects. Loans may be made to improve water use efficiency and water-related projects that improve water quality. Rates are set by the Legislature and recently have been between 4% and 5%. Although it is possible that many projects could qualify for a loan under this program, a revision to the statute would clarify that extension of existing water and sewer systems, as well as new water and sewer systems, would qualify for loans.
21. Finding: A governing body implementing the provisions of section 76-3-504 (1)(g)(iii), MCA, may, subject to the requirements of section 76-3- 511, MCA, require public water systems, public sewer systems, or both.

A. **Recommendation:** Local government subdivision regulations should include a requirement that when a residential subdivision creates 30 or more lots with an average lot size of less than 3 acres, a subdivider must provide public water and sewer systems unless an alternative is approved by the local government.

B. **Recommendation:** These issues are of significant importance to Montanans and should be addressed during upcoming legislative sessions and interims.

Montana Water Management Framework

Similar to other western states, Montana water law is based on the prior appropriation doctrine. The prior appropriation doctrine, which means first in time, first in right, evolved as western lands were developed through mining and agriculture. The eastern United States is based on a riparian doctrine, which provides that property owners along the banks of a surface water source have the right to use the water that runs through or is pooled on their property. Those that aren't located along a surface water body are not entitled to water.

The riparian doctrine didn't work well in the arid western United States and the prior appropriation doctrine emerged as the predominant method of appropriating water. Settlers needed access to water for livestock, farming, and mining operations that were often not located on a surface water body, and they moved the water to where they needed it. Sometimes the movement of water was extensive and it is probably safe to say that none was more extensive than the federal irrigation projects.

In Montana, a water user had only to put the water to beneficial use to have a water right. There was no requirement that the use of the water be filed. However, a water user could file the water use in the county. Some water users filed and some water users did not. Those that put water to beneficial use first have the most "senior" water rights and are therefore entitled to their share of the water first. Water is shared among users on a water source based on priority date or "first in time, first in right".

The more recent or "junior" a water right, the less likely the water user will receive the water in times of low or limited water supplies. A junior water right holder receives their water only if all of the senior water rights have been fulfilled.

Water is shared among users on a water source based on priority date or "first in time, first in right".

The Montana Constitution

In 1972, the Constitutional Convention recognized the importance of Montana's water to the future of the state and its people. The Constitution made it clear that all waters of the state are the property of the state for the use of its people. Article IX, section 3, of the Montana Constitution provides:

> "Section 3. Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are

hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records."

Because not all water use was required to be filed with the state or with the county, there was no way to quantify the water rights that are guaranteed through subsection (1) of Article IX, section 3. Policymakers knew these rights were recognized and confirmed; they just didn't know who had the right to use the water, where the water was put to beneficial use, how much water was used, when the water was used, and other important elements of a water right. The Legislature recognized this problem and initiated a statewide water adjudication to quantify all existing water rights in the state of Montana that were in effect prior to the passage of the new Constitution.[2]

Subsection (4) of Article IX, section 3 required the legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records, in addition to the present system of local records.

The Department of Natural Resources and Conservation

Water in Montana is managed by the Department of Natural Resources and Conservation (DNRC). The water rights process in the Department is managed by the Water Rights Bureau and is split into two program areas—the new appropriations program and the water adjudication program.

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[2] A more detailed description of the statewide adjudication and ancillary issues can be found in the Legislative Environmental Policy Office Publication "Montana's Water - Where is it? Who can use it? Who decides?" (2004) (http://leg.mt.gov/css/publications/environmental/default.asp).

The water rights process in the DNRC is managed by the Water Rights Bureau and is split into two program areas—the new appropriations program and the water adjudication program.

The new appropriations program addresses applications for state-based water rights or "new" uses of water (after the 1972 Constitution) and "changes in appropriation rights", which involve changing an element of an existing water right. The adjudication program is responsible for examining claims that were filed as a part of the statewide water adjudication process, providing assistance to the Montana Water Court, maintaining the centralized water right records, and updating water right ownership records.

The DNRC also has other water management responsibilities. The other water bureaus that are within the Water Resources Division are the Water Management, Water Operations, and Water Projects Bureaus.

The Water Management Bureau develops and analyzes policies on statewide water resource issues, represents and protects Montana's water interests in regional and international river basins, and assists local watershed groups and water users to solve water management problems by providing technical support to other DNRC bureaus, the Reserved Water Rights Compact Commission, and other governmental entities.

The Water Operations Bureau administers the following programs:

- Dam safety — Ensures that the approximately 90 dams statewide that have the potential to cause loss of life downstream if they fail are properly constructed, maintained, and operated.
- Flood plain management — Assists the 110 locally administered flood plain management programs throughout Montana in reducing the loss of life and structural property through wise flood plain development and in reducing the loss of functional flood plains by reducing the amount of erosion of stream banks due to unwise flood plain development throughout Montana.
- Water measurement program — Provides technical information and water measurement requirements regarding diversion from streams where chronic dewatering has caused water use disputes or severe dewatering impacts.
- Board of Water Well Contractors — BWWC is responsible for licensing water well drillers and contractors and enforcing water well construction standards.

The Water Projects Bureau administers the operation and maintenance of state-owned water projects. These include 22

dams, with approximately 250 miles of irrigation canals and one 10 MW hydropower facility. The bureau is also responsible for dam safety of 10 dams owned by the Department of Fish, Wildlife, and Parks. Most of the DNRC projects are operated by local water users associations that use the water for irrigation. Many of the projects provide secondary recreational benefits including camping, fishing, and boating.

In addition to the DNRC there are two other entities that are intimately involved with water rights and water management in the state of Montana.

The Montana Water Court

The Montana Water Court was created in 1979 and is responsible for hearing all cases regarding water use in Montana. The Chief Water Judge serves a 4-year term and is appointed by the Chief Justice of the Supreme Court. In addition to hearing cases related to water use, the Water Court is responsible for issuing decrees in the statewide water adjudication. The Water Court has adopted both procedural rules and claims examination rules that must be followed by DNRC when the department is examining claims filed pursuant to a Montana Supreme Court order regarding the statewide water adjudication.

There are four water divisions in Montana that were created by section 3-7-101, MCA, to adjudicate existing water rights and to conduct hearings in cases certified under section 85-2-309, MCA. The water divisions boundaries are established as defined in section 3-7-102, MCA. Each water division is presided over by a water judge. These water judges are district court judges who are also designated as water judges. Because of extremely large workloads faced by district court judges, most certified hearings and other water-related controversies are heard by the Water Court rather than by the water division water judges. However, based on the accelerated pace of the statewide adjudication process, there is a possibility that this practice may not be able to continue because of the Water Court workload related to decree issuance and addressing all issue remarks prior to issuance of a final decree.

In addition to hearing cases related to water use, the Water Court is responsible for issuing decrees in the statewide water adjudication.

The Reserved Water Rights Compact Commission

The Reserved Water Rights Compact Commission was created in 1979 by the same legislation that created the Water Court. At the time, the federal government was involved in litigation on behalf of the seven reservations for their federal

reserved water rights. The Commission was created in response to uncertainty about how, and in what court, the adjudication would proceed.

The Commission is a division of DNRC and is administratively attached to the Department for budget purposes. The Commission's only mandate is to negotiate an equitable apportionment and division of the waters of the state between the tribes that are claiming those waters (as well as nontribal federal users) and nontribal state water users. The Commission is not separate from the adjudication process but is integral to it, and the outcome of the entire statewide adjudication process is critical to the work of the Commission.

The Compact Commission's only mandate is to negotiate an equitable apportionment and division of the waters of the state between the tribes that are claiming those waters (as well as nontribal federal users) and nontribal state water users.

Montana is the only state with a Compact Commission. Some other western states are involved in negotiation with the tribes and the federal government through their attorneys general or natural resources departments. Montana's process has been successful because negotiations are conducted in the context of litigation—if a tribe or federal entity chooses not to negotiate, then its reserved water rights will be litigated by the Attorney General, on behalf of the state, in Montana's Water Court.

The procedures the Commission follows are clearly spelled out in statute. The first step is to negotiate an initial settlement between the three involved parties—the state, the claimant of the reserved water right, and, if the claimant is an Indian tribe, the federal government as trustee for the tribe. Once the initial settlement is reached, and it can take many years, the compact is then ratified by the Legislature and becomes a part of the Montana statutes. Water compacts involving tribal settlements then go to Congress because of necessary authorizations and appropriations for projects or improvements. The final step in the process occurs when the compact is filed with the Water Court and is published as a decree in that water basin. At that time, the 6-month objection period begins.

The Water Court has statutory authority to approve or disapprove a compact but not to amend one, and approval is based on a consent decree standard. A consent decree standard is one where all parties consent to the decree and the decree conforms to applicable law. To date, the Legislature has approved five tribal and several federal water compacts. The Northern Cheyenne and the Rocky Boy's Compacts have gone through the entire

process, and the Fort Peck Compact is in front of Congress because of concerns of downstream states over water marketing provisions, although other provisions are operational and have been approved by the Interior and Justice Departments. The Crow and Fort Belknap Compacts have been approved by the Legislature but are still waiting for federal approval and necessary legislation. The necessary federal legislation appears to be moving forward, but the outcome is unknown at this time. The Blackfeet Compact, which is still under negotiation, will be of critical importance because of the St. Mary Project located at the headwaters of the Milk River. The water moving through the St. Mary Project is so crucial to the entire Milk River Basin that there is language included in the Fort Belknap Compact that if the St. Mary Project is not maintained to current standards, then the entire Fort Belknap Compact is void. The Confederated Salish/Kootenai Compact is also still under negotiation and is of a high priority because of the permitting freeze in place on the Flathead Reservation.

The Tribes brought water rights cases before the Montana Supreme Court and won, and the Supreme Court placed a moratorium on new state water rights permits until the water rights are quantified.

A federal reserved water right is created when the federal government reserves land for an Indian tribe, thereby impliedly reserving enough water to fulfill the purposes of the reservation. The federal reserved water rights doctrine was decided in 1908, but it wasn't until the 1960s that questions arose as to what that means in terms of quantity. A federal reserved water right does not lapse from lack of utilization.

Montana Water Law Basics

In Montana, a person must have a water right prior to appropriating water and putting the water to beneficial use, unless the use falls under exemptions provided for in section 85-2-306, MCA:

- A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:
  - the maximum capacity of the impoundment or pit is less than 15 acre-feet;
  - the appropriation is less than 30 acre-feet a year;
  - the appropriation is from a source other than a perennial flowing stream; and
  - the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger.
- Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet a year, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. (A notice of completion must be filed with DNRC.)
- An appropriator of ground water by means of a well or developed spring first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder is now required to file a notice of completion.

Water rights are required for both surface water appropriations and ground water appropriations. Montana law does not provide for conjunctive management or enforcement of surface water and ground water rights.

However, after the decision in Montana Trout Unlimited v. DNRC, 2006 MT 72, that was issued in 2006 and enactment of House Bill No. 831 in the 2007 session, the connectivity between surface water and ground water in closed basins must be considered and plays a role in determining whether or not an application for a new ground water permit can be approved.

Closed basins are closed to certain new water appropriations. Five of the closed

basins were closed by the Legislature in statute. There are also multiple subbasins and basins that have been closed administratively pursuant to section 85-2-319, MCA, which can be found in the Administrative Rules of Montana under 36.12.1010, ARM, through 36.12.1021, ARM.

With the passage of House Bill No. 831, new ground water appropriations can be made in closed basins if the applicant for the water right complies with more stringent application requirements that include a hydrogeologic assessment and, if necessary, a mitigation or aquifer recharge plan and ensures that a "senior" or prior surface water appropriator will not be adversely affected by the new water use.

The connectivity between surface water and ground water in closed basins must be considered and plays a role in determining whether or not an application for a new ground water permit can be approved.

Applying for a new ground water permit in a closed basin is complex due in part to new statutes, case law, and pending litigation on multiple issues. In general, it is more difficult to obtain an appropriation in a closed basin than in other basins.

House Bill No. 831 is included in **Appendix B.** A flow chart outlining the closed basin ground water appropriation process is included in **Appendix C.**

Legal Issues in Closed Basins

Two court cases involving exempt uses in closed basins contributed to the changes passed in House Bill No. 831 by the 2007 Legislature.

Closed basins in Montana date back to the administration and statewide adjudication of water rights for determining the priority of post-1973 claims to water. It became clear that there were significantly more adjudicated and legitimate nonadjudicated claims to water than there was available water. The Legislature responded to this fact by enacting a moratorium on new applications in the overappropriated basins.

During the statewide adjudication, it became clear that there were significantly more adjudicated and legitimate nonadjudicated claims to water than there was available water.

The Legislature enacted basin closures for the Teton River basin, sections 85-2-329 and 85-2-330, MCA, the Upper Clark Fork River basin, sections 85-2-335 through 85-2-338, MCA, the Jefferson River basin and Madison River basin, sections 85-2-340 and 85-2-341, MCA, and the Upper Missouri River basin, sections 85-2-342 and 85-2-343, MCA, and a temporary subbasin closure for Bitterroot River subbasins, section 85-2-344, MCA. In addition, section 85-2-319, MCA, provides that in a highly appropriated basin or subbasin, the Department of Natural Resources and Conservation (DNRC) may by rule reject permit applications or modify or condition permits already issued.

With certain statutory exceptions, each basin closure statute provides that the DNRC may not process or grant an application for a permit to appropriate water within the closed basin. New ground water applications represent one of the statutory exceptions. The Legislature recognized, however, that some ground water bears a close relationship with surface water and that allowing unrestricted appropriations of ground water would defeat the purpose of the basin closure laws.

Prior to the passage of House Bill No. 831, each basin closure law, with the exception of the Upper Clark Fork River basin, defined ground water in a way that forbid the processing of new applications for ground water that is

"immediately or directly connected" to the basin's surface water.[3]

In the Upper Clark Fork River basin, an application for a ground water permit had to be accompanied by a report prepared by a professional engineer or hydrologist addressing the hydrologic connection between the source of the ground water and surface water. The DNRC could not issue a permit to appropriate ground water in the Upper Clark Fork River basin unless the applicant proved by a preponderance of evidence, in addition to the criteria of section 85-2-311, MCA, that the source of the ground water was not a part of or substantially or directly connected to surface water.

The DNRC could issue a permit to appropriate ground water if the application included an augmentation plan and if the applicant proved by a preponderance of evidence, in addition to the criteria of section 85-2-311, MCA, that the augmentation plan provided sufficient augmentation water in amount, time, and location to replace depletions to senior water rights.

The legislative history for the basin closure statutes provides little insight with regard to the exceptions to the basin closure statutes and indicates that most of the concerns giving rise to the bills related to surface water.

The Connection of Ground Water and Surface Water

A dispute arose over applications for new ground water permits in the Smith River drainage, part of the Upper Missouri River closed basin. The DNRC prepared a supplemental environmental assessment for the Smith River basin in February of 2003 and noted that the Smith River and its principal tributaries are hydrologically connected to ground water.

Smith River State Park. Montana Fish, Wildlife and Parks photo.

The supplemental environmental assessment further noted two ways that ground water pumping affects surface stream flows.

First, pumping may intercept ground water that otherwise would have entered the stream, thereby causing a reduction in surface flows. This phenomenon is called the prestream capture of tributary ground water.

Second, ground water pumping may pull surface water from the stream toward the

[3] In House Bill No. 831, see revisions to sections 85-2-329(2), 85-2-340(2), and 85-2-342(2), MCA.

well. The DNRC refers to this pulling as induced infiltration. The DNRC's hydrogeologist reported that a stream takes longer to recover from prestream capture of its tributary ground water than from depletion through induced infiltration.

Under the basin closure law, the DNRC had to determine whether an application for ground water included ground water that is "immediately or directly connected to surface water" for the application to qualify under the ground water exception. The Legislature did not define "immediately or directly connected to surface water" in any of the basin closure laws.

The DNRC interpreted the language to mean that a ground water well could not pull surface water directly from a stream or other source of surface water. This interpretation made no mention of the potential influence of the prestream capture of tributary ground water on surface flow.

The DNRC processed new applications before making a threshold determination that the applications fell within an exception to the Upper Missouri River basin closure law. Trout Unlimited and other interested parties initiated suit against the DNRC.

During the litigation, DNRC adopted ARM 36.12.101(33), defining "immediately or directly connected to surface water" to mean ground water "which, when pumped at the flow rate requested in the application and during the proposed period of diversion, induces surface water infiltration." The definition again ignored water diverted from streams through prestream capture of tributary ground water.

In Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, the Montana Supreme Court stated that the Upper Missouri River basin closure law serves, in part, to protect senior water rights holders in the Upper Missouri River basin.[4]

The Court noted that the DNRC's interpretation of "immediately or directly" indicated that the DNRC considered ground water to have an immediate or direct connection to surface water if ground water "pumped at the flow rate requested in the application and during

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[4] 2006 MT 72, 331 Mont. 483, 133 P.3d 224 (2006). Under section 85-2-308(3), MCA, individuals whose property, water rights, or interests are adversely affected by the proposed application may object. The restriction on processing applications saves appropriators the time and expense of having to defend their water rights every time a new applicant seeks to appropriate water in the basin. The Legislature provided interested parties with greater protection than the right to file objections and proceed to contested case hearings by insulating them from the burden and expense of the objection process.

the proposed period of diversion, induces surface water infiltration." This formal interpretation embodied in ARM 36.12.101(33) comported with the informal interpretation embodied in a letter from former Director Bud Clinch to the Meagher County Conservation District Administrator.

The DNRC's interpretation of "immediately or directly connected" failed to account for impacts to surface flow caused by the prestream capture of tributary ground water.

The Court noted that the DNRC's own hydrogeologist recognized the impact to surface flows caused by the prestream capture of tributary ground water. The Court quoted the DNRC's hydrogeologist as stating that ground water pumping produces two separate components that contribute to total streamflow depletion. The first component, ground water capture, is the interception of ground water flow tributary to the stream that ultimately reduces the hydraulic gradient near the stream and baseflow to the stream. Streamflow depletion from ground water capture usually continues after pumping ends and may require long periods of time to recover.

The second component, induced streambed infiltration, usually has less impact on streamflow depletion, and its effects dissipate soon after pumping ends.

The Court determined that the DNRC had failed to account for the direct connection between surface flows and the prestream capture of tributary ground water in its implementation of the Upper Missouri River basin closure law despite possessing a wealth of information supporting the connection.

The Court stated that the DNRC's interpretation of the Upper Missouri River basin closure law conflicted with the statute and did not provide sufficient protection to reasonably effectuate its purpose—the protection of senior water rights holders and surface flows along the Smith River basin.

The Municipal Exemption

House Bill No. 831 also addressed another issue that came to light in a court case: the definition of what constituted a municipal use. In addition to the ground water exception in the Upper Missouri River basin closure law, there was an exception for a permit to appropriate water for domestic, municipal, or stock use.

In 2004, the DNRC proposed to define "municipal use" as "uses associated with a water system for municipalities and incorporated or unincorporated towns and cities".

During the rulemaking process, the DNRC then amended the "municipal use"

definition from "uses associated with a water system for municipalities and incorporated or unincorporated towns and cities" to "water appropriated by and provided for those in and around a municipality or an unincorporated town". The agency later decided to eliminate the definition altogether.

At issue was whether or not the Legislature intended for private developers to appropriate water under the exemption.

According to the DNRC, it had issued numerous permits since 1973 with municipal use to entities that were not a town or city. The DNRC cited Mountain Water Company, a public utility that supplies water to the town of Missoula, as an example. The DNRC stated that the Legislature would have been aware of those water rights when it enacted the basin closure laws in 1991 and 1993. Therefore, DNRC believed that it was prudent to revert to the historical practice rather than enforce a rule that might be illegal.

The DNRC stated that it would propose a new rule definition, with the opportunity for public comment, after further considering legislative intent, or that the DNRC might seek clarification directly from the Legislature. The DNRC also stated that until a final determination was promulgated, the DNRC would continue to operate under its historic practice, accepting applications for municipal use from entities who are providing water for uses that are similar to a municipality such as commercial, fire protection, watering parks, and household uses.

In Lohmeier v. State of Montana, Department of Natural Resources and Conservation, the plaintiffs sought to have the decision to eliminate the definition of "municipal use" from rules declared invalid.[5]

Judge Dorothy McCarter stated that application of liberal definitions to any of the enumerated exceptions to the basin closure laws would clearly undermine the purpose of the laws, which is to protect the existing water rights.

Expanding the definition of "municipal use" to permit private developers in the Upper Missouri River basin to appropriate water for new subdivisions would most likely take a significant amount of water away from the already overappropriated water source, resulting in not enough water for the owners of the existing water. Judge McCarter concluded that the Legislature intended to preserve the existing water rights by closing the Upper Missouri River basin to new appropriations. She also concluded that the exceptions to the closure must be

[5] Cause No. ADV-2006-454, First Judicial District (March 2007).

interpreted narrowly to comply with the legislative intent.

The striking of the narrowly defined term "municipal use" in order to enable the DNRC to apply a more liberal definition contravened the legislative intent and placed the existing water rights of the plaintiffs in jeopardy. The plaintiffs were granted summary judgment, which had the effect of reinstating the definition of "municipal use."[6]

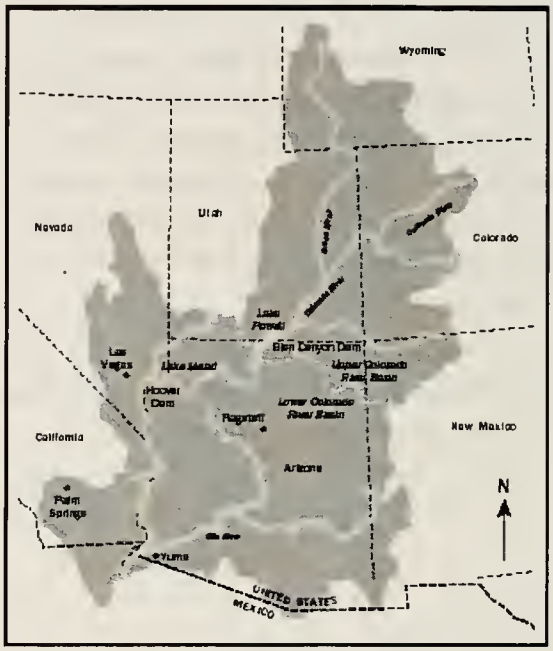
This issue was addressed in House Bill No. 831 by allowing the appropriation of surface water in closed basins by or for a municipality, which is defined as an incorporated city or town organized and incorporated according to state law.

However, the new law only applies to applications for an appropriation right in a closed basin filed on or after May 3, 2007. Applications for permits filed prior to that date will still be governed by the prior version of the closed basin statutes.

[6] The DNRC has appealed Lohmeier to the Montana Supreme Court.

Water Management: Other States

As the Montana Legislature considers water law in Montana—including water management, water availability, and water rights—it is appropriate to consider the approaches taken by other western states that are subject to the prior appropriation doctrine. The states analyzed were chosen because of the various factors affecting each of them and their similarities and differences with regard to water management.



Colorado River Basin
http://www.waterencyclopedia.com/Ce-Cr/Colorado-River-Basin.html

Arizona

The Arizona Department of Water Resources (ADWR) is the state agency that manages Arizona's water supply. Arizona has historically managed ground water resources and surface water resources separately. This practice is continued today. One critical piece of Arizona's surface water management is the state's allotment of Colorado River water.

In 2006 the state negotiated a preliminary agreement among the seven Colorado River basin states regarding modification of the operational framework for the Colorado River, including preferred alternatives for conjunctive operation of Lakes Powell and Mead and shortage criteria for the lower division states and Mexico. Arizona's surface water availability and management is directly related to how the Colorado River is managed and activities of other states and countries that have a right to a portion of Colorado River water. One of Arizona's water management goals is to put all of their Colorado River allotment to use—in some areas this includes storing portions of this water in subsurface aquifers through aquifer storage and recovery projects.

Arizona requires each new subdivision to show that there is at least a 100 year

supply of water available prior to the subdivision being approved.

In the early 1980s the state legislature recognized that ground water resources were diminishing and created the 1980 Groundwater Management Code. The Legislature enacted the Code to relieve the problem of ground water overdraft or "mining" in parts of Arizona that were designated Active Management Areas or AMAs. The three primary goals of the Code are:

- to control the severe overdraft occurring in many parts of the state;
- to provide a means to allocate the state's limited ground water resources to most effectively meet the changing needs of the state; and
- to offset Arizona's use of ground water through renewable water supply development.

The level of management and regulation related to water use varies based on the area of the state and its designation. The least prohibitive and most broad level is the statewide management provisions, which include well drilling and abandonment standards, well registration requirements, ground water transportation restrictions, and, outside of an AMA, adequate water supply requirements.

The second tier of the management structure is Irrigation Non-Expansion Areas or INAs. INAs are in effect in areas where there was significant ground water overdraft but not severe enough to warrant an AMA designation. The management object in an INA is the prevention of further declines in ground water supplies primarily through prohibition of irrigation acreage expansion. The ADWR generally does not regulate the quantity of water used within an INA, although water users are required to file for underground storage and recovery permits, file notice of intent to drill wells, and obtain notices of irrigation authority to irrigate eligible lands. Also, owners of nonexempt wells must use approved measuring devices and submit annual ground water pumping reports.

The third tier and the most restrictive with regard to management are the AMAs. AMAs are statutorily designated areas within the state that were identified based on the magnitude of the ground water overdraft. Three of the four AMAs are directed to achieve a "safe yield" level by 2025, which means that those areas must ensure that the long-term balance between the amount of ground water withdrawn and the amount of water naturally recharged to the aquifer through rainfall or artificially returned to the aquifer through recharge projects is maintained.

Each of the AMAs has a management plan that is developed by the state and local water users. Background information and data concerning water use patterns are contained in the management plans and

help to ensure that water conservation requirements are implemented. Information gathered from annual water use reports is used to estimate the volume of ground water withdrawals, water stored, and water recovered in an AMA. Water budgets are constructed from this data to illustrate a total supply and demand for a given year.

"Conversion to non-groundwater sources is the single most important means of achieving the management goals within the AMAs" according to the ADWR annual report. It is apparent that the state of Arizona is trying to allocate and use every available surface water resource while protecting, saving, and replenishing their ground water resources. The water management agency has stated that additional opportunities must be pursued to substitute renewable or imported supplies in place of mined ground water.

Colorado

The Colorado Division of Water Resources administers all water rights in the state of Colorado pursuant to the prior appropriation doctrine. A system for permitting ground water wells was established in 1957 with the passage of the Colorado Ground Water Law of 1957. After 1969, surface water and ground water have been administered together.

In Colorado the state engineer and the division engineer of the area where a water right application is submitted work with the water court for that particular division in considering applications for a new appropriation. The application is filed with the appropriate water court, which then publishes it in a newspaper to serve as notice. The division engineer provides a recommendation to the water court regarding whether or not the application should be approved. Parties who have a concern regarding the application have an opportunity to oppose the application. If there is no opposition, the water court judge makes a determination and either grants or denies the application. If the application is granted, it is entered into the decree and enforced through the use of water commissioners. If there is opposition to the application, unless the opposition can be alleviated by negotiations between the applicant and the opposing party, the case goes before the water court for trial. If any party is unhappy with the outcome of a case, the party may appeal the water court's decision to the Colorado Supreme Court.

Some priorities on major stream systems in Colorado date back to the 1850s. According to the Colorado Division of Water Resources, most of the stream systems have been overappropriated

since the 1890s. Surface water appropriations may still be allowed if they can be shut off when a senior water right is calling for water. The state discourages domestic surface rights without augmentation so the domestic supply does not have to be shut down if or when a call is made. For the most part, only small residential and livestock wells are allowed to be drilled without providing for protection to senior water rights.

Ground water permitting in Colorado is broken into two types of wells—exempt wells and nonexempt wells.

Exempt wells are limited specifically by the conditions stated on the permit when it is issued. Usually the permits limit the pumping rate to no greater than 15 gallons per minute. Except in limited cases, an exempt well permit will not be issued where either a municipality or a water district can provide water to the property and in most cases only one exempt well permit will be issued for a single lot. The following types of wells are considered exempt wells:

- Household use only wells;
- Domestic and livestock wells with certain conditions;
- Commercial wells (1/3 ac ft per year limitation);
- Unregistered existing wells - had to be put to beneficial use prior to May 8, 1972;
- Monitoring and observation wells;
- Replacement wells; and
- Geoexchange systems.

New nonexempt wells must be located more than 600 feet from any other production well not owned by the applicant unless the state engineer determines otherwise. Subdivision wells that are part of a subdivision created after June 1, 1972, for the most part are governed by a water court-approved augmentation plan.

Colorado also has what are called "Designated Ground Water Basins" or "Designated Basins". Ground water within these basins is considered "designated ground water". Designated ground water is ground water that, in its natural course, is not available to or required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream. The Colorado Ground Water Commission is a regulatory and an adjudicatory body authorized by the Colorado General Assembly to manage and control designated ground water resources within the state. Ground water applications in these areas are not subject to water court involvement as outlined above.

Idaho

The state of Idaho is also a prior appropriation doctrine state. All surface and ground water are the property of the state whose duty it is to supervise their

appropriation and allotment to those diverting the water to any beneficial use. Idaho water is managed by the Idaho Department of Water Resources (IDWR).

Idaho has five different types of water rights. These are:

- permits - the state issues permits that allow the development of a water right;
- licenses - issued after a water right is developed;
- statutory claims;
- beneficial use claims (Snake River basin adjudication); and
- decreed rights - these rights are issued after an adjudication has been before the court and represents ownership of the water right.

There are exemptions to permitting requirements for certain ground water rights as a result of exemptions in the 1950 ground water statutes. All uses require a recorded water right except:

- domestic ground water (no more than 13,000 gpd and 1/2 acre);
- other ground water uses (use must be within .04 cfs and 2,500 gpd); and
- instream stock watering.

The state of Idaho has also recently completed the Snake River basin adjudication, which was started in 1987 and addressed more than 120,000 claims. This adjudication determined all of the claims to the use of water in the Snake River basin in Idaho. The final result is more than 120,000 decreed water rights.

In Idaho, once the water rights are decreed or licensed, the state administers or manages them through water districts and water masters. State water districts are entities of the state and the water users that hold water rights within those districts elect a water master that is approved by the department director. It is the water master's responsibility to distribute the water rights in the district pursuant to their priority dates. Outside of water districts the IDWR director may regulate and enforce water rights, but it is done on a case-by-case basis rather than with a water master.

Idaho also provides for "conjunctive management", which is defined as the "legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply."

This issue is currently subject to litigation that involves a curtailment order on ground water withdrawals because of a

call made by senior surface water appropriators.[7]

Idaho also has different types of ground water designations. Critical ground water areas are defined as "any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates for withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time by the director of the Idaho Department of Water Resources".

The IDWR can propose or require a management plan in these areas. There is also a "ground water management area", which is a bit less stringent than the critical ground water management area. Under both the ground water management area and the critical ground water management area, the director can issue a curtailment of ground water use by some or all of the water right holders.

Washington

The Washington Department of Ecology manages the state's water resources. Similar to the other western states, the state of Washington in both its constitution and its statutes has stated that "water is a public resource held in trust for the people." Washington also functions under the prior appropriation doctrine.

All adjudications are handled by state courts and heard by a superior court judge or by a water referee who hears the evidence and makes recommended findings to the court. The Department of Ecology began a general adjudication of surface water rights in the Yakima basin in 1977. This adjudication is still pending in the superior court.

For surface water permit applications, the Department of Ecology considers what is called the "four-part" test, which considers:

(1) Is there water available?

(2) Is the application for a beneficial use?

(3) Will granting the application adversely affect existing water rights? and

(4) Will granting the application be detrimental to the public interest?

Through this four-part test, the Department of Ecology may also consider water quality issues as a part of the public interest criteria. Based on its assessment of the four-part test, the Department of

[7] More details regarding the curtailment order and its progress through the court system can be found at: http://www.idwr.idaho.gov/about/issues/Curtailment_Order_Information/Curtailment_Information_2008/Curtailment_Information_2008.htm

Ecology may grant, deny, or condition the permit. The agency's decision can be appealed to the Pollution Control Hearings Board and from there through the court system. Interested third parties may intervene in the action at both the administrative and judicial level.

Once a permit is granted, the applicant has a reasonable amount of time to "perfect" the water right through the actual appropriation of water to or for a beneficial use. If this is completed, the applicant is granted a certificate for the water right outlining the actual terms of the water right, including the extent and nature of the right.

In 1945, the Washington Legislature adopted a comprehensive law related to ground water. Prior to the 1945 legislation, ground water was treated differently based on case law and different types of ground water. The courts interpreted the 1945 law to only apply to specific types of ground water, but in 1973 the Washington Legislature amended the definition of ground water to make it clear that the ground water law applied to all ground water not only to "percolating waters".

The 1973 ground water law made it clear that a permit was necessary before ground water could be appropriated. However, like other western states, the Legislature provided exemptions to the permit requirements for certain types of uses, including for the use of water reclaimed from wastewater treatment facilities and certain relatively small withdrawals, such as:

- water for stock water;
- lawn and/or noncommercial garden watering (may not exceed 1/4 ac);
- single or group domestic uses (may not exceed 5000 gpd); and
- industrial uses (may not exceed 5000 gpd)

In a paper prepared in 2000, the Washington Attorney General states the following with regard to exempt uses: "In recent years there is recognition that the cumulative effect of exempt withdrawals may be significant. Since there is no requirement that the amount and nature of such withdrawals be reported, the state has no precise information concerning their cumulative effect."

In addition to the "four-part" test that is applied for surface water applications, the Department of Ecology must also take into consideration whether or not a proposal is reasonable and feasible with regard to the type of pumping that is being contemplated. The seniority of a ground water pumping right is limited to the "reasonable pumping level".

In 1985, the Legislature again passed a law related to ground water. This time the law was an effort to minimize or stop overdrafting and try to ensure future

water availability. The Department of Ecology was directed to adopt ground water areas and subareas and the Department was authorized to prioritize water use within these areas.

The ground water code also covers the use of water that is returned to the aquifer through return flows with regard to who has a right to appropriate the water. A court case that involved the Bureau of Reclamation addressed this issue with regard to whether state or federal law applied when the return flows were a result of a federal project.

New Law; New Terms

In passing House Bill No. 831, the 2007 Legislature clearly outlined in the preamble to the measure why it was needed. In part, it noted that there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needed guidance from the Legislature on how to proceed. It noted the importance of protecting senior appropriators as well as preserving the quality of Montana's water.

Toward that end, legislators said ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator.

In also passing House Bill No. 304, which created the Water Policy Interim Committee, the Legislature acknowledged that some of the provisions of House Bill No. 831 would need further study as they were implemented.

Several of the study tasks dealt with new terms introduced into statute, including:

* Aquifer injection - the use of a well to inject water directly into an aquifer system without filtration through the geologic materials overlying the aquifer system for the purpose of aquifer recharge or for an aquifer storage and recovery project.

* Aquifer recharge - either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water.

* Aquifer storage and recovery project - a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

*Hydrogeologic assessment - a report for the project for or through which water will be put to beneficial use, the point of diversion, and the place of use that describes the geology, hydrogeologic environment, water quality, and predicted net depletion, if any, including the timing of any net depletion, for surface water

within the closed basins that are subject to an appropriation right, including but not limited to rivers, streams, irrigation canals, or drains that might be affected by the new appropriation right and any predicted water quality changes that may result.[8]

* Mitigation - the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water.

In general, House Bill No. 831 allowed for new ground water appropriations in closed basins if the applicant for the water right complies with more stringent application requirements that include a hydrogeologic assessment and, if necessary, a mitigation or aquifer recharge plan that ensures senior water rights will not will not be adversely affected. The law also allowed aquifer storage and recovery projects and defined those projects as a beneficial use of water.

Water Quality

Several components of the new law deal with the possible mingling of water sources through mitigation or aquifer recharge. The law requires that an aquifer recharge plan that uses sewage from a system that requires a discharge permit also must obtain a discharge permit for the aquifer recharge plan.

In general, House Bill No. 831 allowed for new ground water appropriations in closed basins if the applicant for the water right complies with more stringent application requirements.

The minimum requirements for aquifer recharge plans in this scenario are certain federal regulations and removal of at least 60 percent of nitrogen as measured from the raw sewage load to the system or a discharge of a total nitrogen effluent concentration of 24 mg/L or less.

In addition to those requirements, an aquifer recharge plan that uses aquifer injection must meet the more stringent of either primary drinking water standards pursuant to Title 75, chapter 6, MCA, or the nondegradation requirements pursuant to section 75-5-303, MCA, at the point of discharge.

Several water quality experts appeared before WPIC and addressed current laws and possible contamination issues with introducing surface water into ground water. There also was debate about the use of individual septic systems and how

[8] The full definition is in section 85-2-361, MCA.

they may effect water quality in large scale developments.

In September 2007, Kate Miller of the Department of Environmental Quality said an important question is how mitigation or recharge water will be used downstream and whether or not it would be safe to drink. There are concerns about pathogens and pharmaceuticals appearing in drinking water wells. Miller advocated regular screening as part of a monitoring program and that any discharges should be treated to drinking water standards.

In June 2008, Eric Regensburger of the DEQ said there are concerns about ground water quality and subdivision development, specifically the introduction of pathogens, nitrogen, phosphorous, personal care products, and pharmaceuticals into state waters. He showed examples of problems in the area south of Butte, in Helena, in the Billings area, in the Bozeman area, and in Boulder.

Much of the discussion of mitigation and recharge centered around how to supply water for new residential development.

Water Quantity

The new law requires that applications for new ground water use in a closed basin be accompanied by a hydrogeologic assessment, a scientific report that predicts if the new use would result in a net depletion of surface water in the area proposed for the use. If it is determined that a net depletion would adversely affect a senior water right, then the amount of water resulting in the adverse effect must be offset by either a plan of mitigation or aquifer recharge.

Topics addressed by experts and the committee included the requirements and accuracy of the hydrogeologic reports, as well as how mitigation, aquifer recharge, and aquifer storage and recovery may work in various scenarios.

Much of the discussion of mitigation and recharge centered around how to supply water for new residential development.

In July 2007, John Westenberg of PBS&J, a natural resources consulting firm, told the committee that mitigation could be complicated because statewide adjudication is not complete and, in some cases, the decrees may not be accurate. He said most water rights are based on irrigation, and irrigation water rights are limited to a particular period of diversion and the irrigation season. How then, he said, does a water user convert an irrigation use to a year-round domestic use? Westenberg said the DNRC must be flexible in allowing the conversion of irrigation rights.

Michael E. Nicklin, a hydrologist, said there must be a clearer understanding of when a mitigation plan or aquifer recharge plan would be required. He said one should quantify the amount of evapotranspiration before the proposed use and after for a given parcel of land. If the land was irrigated, a comparison should be made to determine if there is a net increase or decrease in evapotranspiration. Nicklin said that if the projected consumptive use for the parcel would decrease, then a plan should not be required.

Jim Potts, a hydrologist with HKM Engineering, said the keys to a successful aquifer recharge system would include high-quality or pretreatment of recharge water, proper soil and aquifer characteristics, monitoring, and emergency backup plans.

Russell Levens, a DNRC hydrologist, said in September 2007 that it is difficult to measure the effectiveness of a mitigation or aquifer recharge because it is difficult to detect changes from the initial application or mitigation. Some effects, he said, may only be significant in times of water shortages. The best way to have effective mitigation, he said, is through an adequate hydrogeologic assessment before the new use is permitted.

Water Supply and Sewage Disposal

As some parts of Montana experienced unprecedented population growth in recent years, controversies about water supply and sewage disposal have risen to the fore, mostly in the closed basin areas of Montana and especially in areas just outside the borders of cities and towns.

Subdivisions may be served by individual wells, including those exempt from the DNRC permit process, as well as individual septic systems. Other options include building community systems that serve the development or connecting to nearby existing systems.

At the September 2007 meeting, Eric Regensburger of the DEQ said that over the last 5 years, three out of every four lots created in Montana are using exempt wells for a water supply. About half of those are lots of less than 2 acres. The concern, Regensburger said, is that there is a higher chance of contamination with high well density.

In October of 2007, Regensburger explained the options for water supply and sewage disposal systems. For lots of 1 acre or larger, the type of system is up to the developer as long as they comply with current laws and regulations.

Lots of less than 1 acre but larger than 20,000 square feet (about one-half acre) must have either a community water or wastewater system. Subdivision lots of less than 20,000 square feet must have both community water and sewage systems.[9]

Regensburger said community wells could be used on most subdivisions, but there are limiting factors, including the higher costs, especially those up-front costs, of serving larger lots. Information about the number and costs of exempt and community wells is included in **Appendix E.**

Developers are being driven to use exempt wells because the DNRC permitting process for water rights takes too long, Dustin Stewart of the Montana Building Industry Association said in October 2007. Stewart suggested that municipal annexation should be made easier to allow connections to existing systems and the Legislature should consider funding for local communities to extend services to outlying subdivisions.

Glenn Oppel of the Montana Association of Realtors said exempt wells allow for affordable development in rural areas.

[9] A public water system serves 25 or more people or 15 or more connections for 60 days or more per year.

He said a statewide policy on limiting exempt wells would not work and suggested a fast-tracking permit process for public systems.

John Tubbs of the DNRC said exempt well usage is the least expensive and least time-consuming option. The costs of obtaining a permit could be as much as $15,000 and a change of water use right could be $20,000. On average, it takes the DNRC 245 days to issue a permit for a new water right, although it generally takes longer in closed basins.

Laura Ziemer of Trout Unlimited said that unlike the new law that requires some mitigation in closed basins, there is no mitigation for exempt wells. She suggested that new exempt wells be required to purchase a mitigation credit or be required to go through permitting.

Michael Nicklin, a hydrologist for the Montana Association of Realtors, explained to the WPIC in January 2008 some of his findings in the Gallatin Valley. He wrote that, "In summary, it is my conclusion that when the overall projected effects of exempt wells are properly accounted for using water budget methods that everyone in the profession of hydrology should employ, it is difficult to conceive that there would be any practical circumstance in any closed basin in Montana where future growth in exempt wells would result in any discernable, detectable, or measurable adverse impact to any prior surface water appropriator. If any such circumstance does exist it would be anomalous. It would be highly questionable to establish water policy for the entire state of Montana on the basis of an anomalous condition."

Nicklin's presentation is included in **Appendix F.**

The DNRC contends that ground water wells have been shown to have an effect on surface water flows. The agency says exempt wells may have an impact on more senior surface water users and would be difficult to enforce a call against in a time of water shortage. A DNRC paper on the effects of exempt wells is included in **Appendix G.**

In April of 2008, the WPIC requested presentations on the Ruby Valley Groundwater Management Plan, which was commissioned by the Ruby Valley Conservation District and the Ruby Watershed Council with the goal to collect field data pertinent to management of ground water and surface water resources. The study concluded that if the goal is to protect surface water flows, water right holders, and aquatic resources, several things need to be considered, including:

- Land use change will drive water use change.
- Irrigation is important to aquifer recharge and late summer river flows.

- New ground water use will impact surface flows.

In June 2008, the WPIC heard presentations from several experts on the effects of different types of irrigation.

John LaFave of the Montana Bureau of Mines and Geology said that flood irrigation return flows affect shallow ground water. More efficient irrigation techniques, such as sprinklers and lined canals, reduce aquifer recharge, late season surface water flows, and wetlands.

The DNRC presented information on the potential consequences of converting from flood irrigation to sprinklers related to the producer, water quality, water quantity, and ecological conditions. (**Appendix G**).

Water Right Enforcement

Mark Twain supposedly knew that a sip of whiskey could quench your thirst, but a grab for water would lead to fisticuffs.[10]

The study tasks directed the WPIC to examine enforcement of exempt wells. Those statutorily exempt wells are not monitored or metered by any state agency. Though the wells are limited to 35 gallons per minute and less than 10 acre-feet a year, the reporting of excesses would likely fall to another water user.

But in addition to debate over enforcement of exempt wells, various presenters touched on aspects of water right enforcement in general.

In September 2007, Tim Hall, who at the time was the chief legal counsel for the DNRC, provided an overview of water right enforcement. While the DNRC has broad statutory authority for enforcement, disputes involving water rights issued prior to 1973 are difficult unless the Water Court has issued a decree through the adjudication process.

For water use permits issued since 1973, there are a number of options if a user suspects water is being used illegally. Those range from having a neighborly discussion to formal mediation to asking for a court injunction. A summary of possible actions is included in **Appendix D.**

In addition to debate over enforcement of exempt wells, various presenters touched on aspects of water right enforcement in general.

If a person is wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use the water, or violating a provision of the Montana Water Use Act, the DNRC can investigate and file a court action. However, Hall said the DNRC does not have the resources to be a statewide water rights enforcer.

State law also allows the DNRC to work with local county attorneys, but Gallatin County Attorney Marty Lambert told the WPIC in April 2008 that his office is already overloaded with civil and criminal work. He added that water right enforcement should be consistent

[10] "Whiskey is for drinking; water is for fighting over." Many sources attribute this quote to Mark Twain, but some note that it was never verified.

statewide, instead of handled differently county by county.

The WPIC also discussed a provision of the Prior Appropriation Doctrine which allows senior water rights holders to make a call for water against more junior rights. The question was how a call made by a senior surface right holder would work against a junior ground water right holder.

In short, Montana does not appear to have had much experience with the impact of a call by senior surface water right holders on junior ground water right holders.

Under the prior appropriation doctrine and the decision in Montana Trout Unlimited v. Department of Natural Resources and Conservation, a call by a senior water right holder must be enforced against junior water right holders in the order of the least priority of the junior water right holders, whether those water rights are surface water rights or ground water rights.

The state of Idaho is experiencing protracted litigation over this issue.[11] In its decision, the Idaho Supreme Court stated that the priority ordering of the state's version of the prior appropriation doctrine is not absolute, and that an as yet undefined reasonableness standard merits consideration when administering the use of hydrologically connected surface and ground water.

An additional factor is Article XV, section 3, of the Idaho Constitution, which gives priority to domestic water rights but requires that junior water right holders must compensate senior water right holders for any taking of their water.

In Montana, there is no prioritization among types of water rights. However, it is much easier to close a headgate on a ditch during a call by a senior appropriator than it is to shut off wells. An additional complicating factor is the legal ability to continue to develop ground water through the use of nonpermitted exempt wells, even in closed basins in which it is recognized that water is overappropriated. During a call for water by a senior appropriator, all junior water right uses are supposed to be curtailed according to their priority under sections 85-2-406(1) and 85-5-101, MCA.

It has long been established that the appropriator of water does not become the owner of water by the act of appropriation. The appropriator acquires the right of the use of the water for some useful purpose. The appropriator for one useful purpose has no preference or superior right in law to an appropriator

[11] See American Falls Reservoir District No. 2 v. Idaho Department of Water Resources, 2007 Opinion 40, Case No. 33249 (Id. March 5, 2007).

for any other purpose. While any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public.[12]

Even though Montana does not constitutionally or statutorily prioritize water rights, a de facto priority for domestic or municipal use may exist. It does not require much imagination to foresee a potential public health crisis if junior domestic or municipal water rights were curtailed by a senior appropriator's call for water. A call for water that implicated domestic or municipal water supplies may require that the applicable government intervene to protect the public health.

State and local governments have inherent power to enact reasonable legislation for the health, safety, welfare, or morals of the public, even though the legislation is an infringement of individual rights. Police power regulations are presumed reasonable, and a clear showing is required for a finding that they are unreasonable.[13]

Even though Montana does not constitutionally or statutorily prioritize water rights, a de facto priority for domestic or municipal use may exist.

The police power of the state, which enables the state to pass laws for the health, safety, and general welfare of the people, must be reasonably adapted to its purpose and must injure or impair property rights only to the extent reasonably necessary to preserve the public welfare.[14]

Although compensation may be owed to the senior appropriator if the senior appropriator's beneficial use is curtailed to protect the public health pursuant to the police power, that issue will probably be resolved on a factually specific basis.

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[12] Fitzpatrick v. Montgomery, 20 Mont. 181, 50 P. 416 (1897). Fitzpatrick bases this conclusion on Basey v. Gallagher, 20 Wall. 670 (1875), an appeal from Gallagher v. Basey, 1 Mont. 457 (1872), in which the United States Supreme Court said: "Water is diverted to propel machinery in flour mills and saw mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual."

[13] State v. Deitchler, 201 Mont. 70, 651 P.2d 1020 (1982).

[14] See In the Matter of the Adjudication of the Existing Water Rights of the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), citing Yellowstone Valley Electric Cooperative v. Ostermiller, 187 Mont. 8, 608 P.2d 491 (1980).

It is even possible that the police power of the state can be exercised even though provision for compensation to the owner of property has not been made.[15]

During his presentation in Choteau, Tim Hall described a decision by the Fourteenth Judicial District Court for Musselshell County involving a water purchase contract in which the District Court ruled that the "remaining stored water level in Deadman's Basin Reservoir has reached a critical level" and that the reservoir water was needed to maintain the Musselshell River flow "to supply domestic, municipal, stock and wildlife water usage."

The District Court prohibited the irrigation of crops from the Musselshell River between August 12 and September 30, 2000, so long as the reservoir maintained its critically low level. On appeal, the Montana Supreme Court determined that the District Court simply made a priority determination regarding domestic and irrigation water consumption based on its own inclinations. In so doing, the District Court exceeded its authority to simply "fill in" a water decree with further delineations.

The Supreme Court ruled that the case was merely one of contractual interpretation and enforcement. Because the case was reversed and remanded, the Supreme Court declined to address the issue of whether the water right holder was entitled to compensation for a "taking" of the water for public purposes.[16]

[15] Ruona v. Billings, 136 Mont. 554, 323 P.2d 29 (1958).

[16] In the Matter of the Petition of the Deadman's Basin Water Users Association to Appoint a Water Commissioner to Distribute Stored Water, 2002 MT 15, 308 Mont. 168, 40 P.3d 387 (2002).

Water Marketing and Reallocation

The Water Policy Interim Committee studied water marketing and water reallocation options available in Montana, including:

* leasing water rights, water banking, water trading, and water sales;
* the lease-to-sale ratio of water rights in Montana;
* the number of market purchases that have been completed in Montana;
* the purposes for which water trades or sales have taken place;
* the feasibility of creating and operating a water bank in Montana; and
* the administrative procedures and costs that would be necessary to establish and operate a water bank in Montana.

In Montana and other states, private people do not own water. But the right to use water for a beneficial use is held by individuals, corporations, and other entities and water rights can be sold or leased.

Property rights are often described as a bundle of sticks associated with a parcel of land. However, each stick has value independent of the bundle. While there are differences in how different rights may be marketed, a water right is one of those sticks. For the purposes of this discussion, the term water marketing covers the buying, selling, transferring, or leasing of water rights.

Water marketing is not a new debate topic in Montana. In 1984, the Legislature's Select Committee on Water Marketing published a voluminous report and several suggestions for future legislation.[17]

"These recommendations concern a strategy for a water policy for Montana in an interstate setting," wrote Sen. Jean Turnage, who chaired the panel. "This agenda is too important and too complex to be addressed by one interim committee or one legislative session. These issues significantly affect the future of Montana. The deliberations around them must be ongoing."

Though those words were written nearly a quarter century ago, water markets are still in their infancy, according to Water Strategist, a newsletter that analyzes water policy, marketing, finance, legislation, and litigation in 17 western states.

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[17] http://leg.mt.gov/content/publications/environmental/1984watermarketing.pdf.

"Water assets are not traded westwide; no indicator can measure overall activity in water markets," the newsletter said in its April 2006 edition. "The economic value of water depends upon the reliability of the underlying water right, quantity, quality, uses and the location and availability of competing sources of supply."

However, in Montana and other states, competing demands for water are driving water marketing discussions. The 2007 Legislature passed House Bill No. 831 regulating ground water appropriations in closed basins. Mitigation plans required under that statute may contain some aspect of water marketing. The strategic plan for the Water Resources Division of the Department of Natural Resources and Conservation includes the tasks of determining where water is physically and legally available for development and creating a report of what rights might be available for sale or change.[18]

In Montana and other states, competing demands for water are driving water marketing discussions.

Water Marketing in Montana

At the suggestion of the water marketing committee, the 1985 Legislature established a water leasing program administered by the Department of Natural Resources and Conservation. The statute allows the Department to acquire water through appropriation in its own name, by agreement or purchase with another water right holder, or by contract for water in certain reservoirs. The water may be leased for beneficial uses.[19]

The statute was amended in 2007. Previously, the program was limited to leasing 50,000 acre-feet. Now, the Department may lease up to 1 million acre-feet of water under contract with the federal government from Fort Peck, Tiber, Canyon Ferry, Hungry Horse, Koocanusa, or Yellowtail or from other reservoirs. Of that 1 million acre-feet, up to 50,000 acre-feet may be leased for beneficial uses outside Montana.[20]

[18] DNRC Water Resources Division Strategic Plan 2005-2010. http://dnrc.mt.gov/wrd/pdfs/wrd_strategicplan05.pdf

[19] Section 85-2-141, MCA.

[20] Senate Bill No. 376. http://data.opi.mt.gov/bills/2007/billhtml/SB0376.htm

Since its inception, no water has been leased under this statute.[21]

However, the 2005 Legislature passed a resolution urging the DNRC to enter into negotiations with the federal Bureau of Reclamation to determine the availability and cost of water stored behind Hungry Horse Dam in hopes that the state might contract for water and then lease it for water development in the Clark Fork River basin.[22]

In 2007, the Legislature appropriated $260,000 to pay for a Hungry Horse leasing study. The DNRC, the Bureau of Reclamation, and others are working on the study now.

Montana owns several of its own water projects around the state, such as Deadman's Basin Dam in Wheatland County and the Tongue River Dam in Big Horn County. The state, through DNRC's state Water Projects Bureau, owns water rights in these projects and leases them primarily for irrigation. The Bureau administers almost 2,000 water marketing contracts for nearly 300,000 acre-feet of water annually though local water user associations. Revenue from the water purchase contracts, leases of lands associated with the projects, and net revenue from hydropower generation supplements funds for state water project rehabilitation costs.[23]

Other water marketing provisions in Montana law are mostly utilized by private parties, although some nonprofit corporations and the Department of Fish, Wildlife, and Parks also play roles.

The law allows for temporary changes in appropriation rights with department approval for 10 years, subject to 10-year renewals. In cases where new water conservation or a storage project is involved, the change may be approved for up to 30 years, again subject to 10-year renewals.[24]

Water may be leased for up to 90 days without DNRC approval for road construction or dust abatement projects.[25]

In 1989, in response to drought conditions that left some streams dry and killed fish, the Legislature passed a bill to allow FWP to lease consumptive water rights for instream flows for terms up to 10 years. This statute, Section 85-2-436, MCA, underwent significant changes in the 2007

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[21] Rich Moy, DNRC.

[22] http://data.opi.mt.gov/bills/2005/billhtml/HJ0003.htm

[23] State Water Projects Bureau 2006 report.

[24] Section 85-2-407, MCA.

[25] Section 85-2-410, MCA.

session.[26] Until July 1, 2019, FWP may change consumptive use appropriation rights that it holds in fee simple to instream flow purposes on up to 12 stream reaches without any time constraints. The Department may enter into leases for instream flow purposes on an unlimited number of stream reaches for terms up to 10 years, with 10 year renewals. However, after June 30, 2019, the agency may not enter into new lease agreements or renew leases that expire after that date. Any change in purpose or place of use must be approved by the Department and is subject to other criteria to protect the rights of other appropriators from adverse impacts.[27]

The owner of a consumptive water right also may either convert the use of that right or lease the right for instream flow to benefit fishery resources.[28]

The lease of an existing right to FWP pursuant to section 85-2-436, MCA, or the temporary change of a right under section 85-2-407 or 85-2-408, MCA does not constitute and abandonment of the right.[29]

A water right holder also may lease or sell water saved through conservation. Lining a ditch to reduce seepage or other measures may result in this so-called "salvaged water."[30]

Except for the temporary change for road projects and dust abatement, the appropriators in each of these changes must prove by a preponderance of evidence that the change meets several criteria, including:[31]

* The proposed change will not adversely affect the use of the existing water rights of other persons, permitted uses, or reserved uses.

* Except for instream flow changes, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

* The proposed use of water is a beneficial use.

* Except for instream flow changes, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

* If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant. The water quality of an appropriator will not be adversely affected.

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[26] Senate Bill 128. http://data.opi.mt.gov/bills/2007/billhtml/SB0128.htm

[27] The 2019 date, as well as other portions of the law, may be amended by future Legislatures.

[28] Section 85-2-408, MCA.

[29] Section 85-2-404, MCA.

[30] Section 85-2-419, MCA.

[31] Section 85-2-402, MCA.

* The ability of a discharge permitholder to satisfy effluent limitations surface water discharge permit will not be adversely affected.

Much of the leasing in Montana under these statutes has been done by the Department Fish, Wildlife, and Parks; Trout Unlimited; and the Montana Water Trust.

Since it was granted the authority to lease water, FWP has signed 17 agreements for instream flow. One lease on Tin Cup Creek could not be renewed and is now held by the Montana Water Trust. Three have been terminated. Most of the leases are with private parties, but one is with a water and sewer district and one is with the Forest Service. The quantity of water leased and the cost varies. A complete history is available in Figure 2 of the 2006 leasing report. There were no new leases in 2007.[32]

Montana Trout Unlimited holds six leases, all in the Blackfoot River Valley. The amount leased varies as does the cost per acre-foot, ranging from 75 cents to more than $25 an acre-foot.[33]

The Montana Water Trust, a nonprofit organization founded in 2001, works with landowners on instream flow leases. The organization holds 15 leases on about 2,600 acre-feet of water per year. In 2007, the Water Trust paid about $63,000 for water.

In addition to these, the DNRC has recorded 23 change authorizations by individuals who changed a part of their water right to instream flow since 1991.[34]

Water rights also may be sold, although unless the owner severs the right from the land, it passes with the conveyance of the parcel.[35] Until action by the 1985 Legislature, the DNRC tracked the number of change authorizations for severed water rights. There are 70 recorded.[36] In 2007, the Legislature mandated that starting this July, a water right holder who severs the right from the land must alert the DNRC.[37]

Water rights also may be sold, although unless the owner severs the right from the land, it passes with the conveyance of the parcel.

[32] 2006 FWP Annual Progress Report - Water Leasing Study.

[33] Trout Unlimited. Terms of Instream Flow Transactions in the Blackfoot.

[34] Terri McLaughlin, DNRC

[35] Section 85-2-403, MCA.

[36] Terri McLaughlin, DNRC

[37] http://data.opi.mt.gov/bills/2007/billhtml/HB0039.htm

It is important to note that Montana water may be marketed for uses out of state; however, there are criteria that must be met, including:[38]

* the proposed use must conform to permit requirements, including that the water is legally available and that senior water right holders are not adversely affected;

* the proposed out-of-state use of water is not contrary to water conservation;

* the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

Water Banking

Under the umbrella of water marketing is water banking. But water banking is a multifaceted term as well. In general, a water bank is an institutional process that facilitates the transfer of water to new uses. In one sense, the water bank operates like a broker, bringing together buyers and sellers. However, the institutional nature of a water bank comes with set procedures and some sort of public sanction for its actions:[39]

Statewide water banking in Montana is not addressed in statute.[40] The leasing laws the state has in place might constitute what is called a lease bank, where a single lessee solicits and temporarily obtains water from one or more lessors for a specific use, often for environmental purposes. In contrast, a water bank involves the exchange of water entitlements through the interaction of multiple sellers and multiple buyers.[41]

The goal of a water bank is to facilitate the transfer of water from one use to another use by bringing buyers and sellers together. Doing so may meet one or more of the following objectives:[42]

* create a reliable water supply during dry years;

[38] Section 85-2-311, MCA

[39] Lawrence J. MacDonnell, "Water Banks: Untangling the Gordian Knot of Western Water."

[40] The Fort Belknap-Montana Compact, codified in Title 85, chapter 20, part 10, MCA, establishes a water bank for implementation in years of significant short-term water shortage. However, the compact must still be ratified by Congress, so no water banking activity has taken place. The provisions provide for grants to purchase water, pricing alternatives and requirements, how banked water is allocated, and a clause providing that the water bank established in the compact is not intended to preclude a more comprehensive water marketing system within the Milk River Basin.

[41] Peggy Clifford; Clay Landry; Andrea Larsen-Hayden. "Analysis of Water Banks in the Western States," Washington Department of Ecology and WestWater Research. July 2004. http://www.ecy.wa.gov/biblio/0411011.html.

[42] Ibid.

* ensure a future water supply for people, farms, and fish;

* promote water conservation by encouraging right holders to conserve and deposit rights into the bank;

* act as a market mechanism;

* resolve issues of inequity between groundwater and surface water users;

* ensure compliance with intrastate agreements of instream flow.

The goal of a water bank is to facilitate the transfer of water from one use to another use by bringing buyers and sellers together.

Water banks may be structured in many ways, but they can be broken down into these general categories:[43]

* Institutional bank. This might be called a paper bank. It functions as a way to exchange water rights and other entitlements. Institutional banks are developed for areas where physical water storage is limited or for large geographic areas. These banks also may be used for natural flow rights or a combination of natural flow and storage rights.

* Surface storage bank. In this case, the exchange of water is backed by water stored in reservoirs or other storage facilities.

* Ground water bank. Ground water banking exchange credits or entitlements for water withdrawals from an aquifer. Under conjunctive use programs, excess surface water is injected or infiltrated into the ground water aquifer to be extracted during times of limited surface water supply. Ground water banking programs also are being developed to provide mitigation in areas with excessive surface water withdrawals.

The entity that administers the bank will likely affect the cost to establish and administer the bank. The administration of the bank also may play a part in the level of trust and participation by water users.[44]

Examples of administrative structures include:[45]

* Public. Most existing water banks are operated by a federal, state, or local governmental agency or an administrative board specifically developed to provide administrative oversight.

* Private nonprofit. This could be a new organization composed of representatives from stakeholder groups or a contract with an existing nonprofit.

[43] Ibid.

[44] Ibid.

[45] Ibid.

* Private for profit corporation. There have been limited attempts at this model.

* Public-private partnership. In this model, a private corporation and a public entity jointly invest capital and operate the water bank.

The administrative costs also will be affected by what services a water bank chooses to offer. At the least, a water bank might aggregate water supplies from willing sellers and facilitate the sale to buyers. Other services may include:[46]

* registry of water rights or entitlements;

* regulating or setting market prices.;

* setting and implementing long-term strategic policies and daily operations;

* establishing whether the bank operates on a year-by-year or continual basis;

* determining which rights can be banked;

* quantifying the bankable water;

* specifying who can purchase or rent from the bank;

* setting transfer or contract terms;

* dealing with any regulatory agencies;

* resolving disputes;

[46] Ibid.

Policy Questions

Water marketing is a vast topic and can spur discussion on a variety of issues. But a few policy questions to consider may include:

* Are current lease and change laws working? Are changes needed?
* What role should the state play in water marketing?
* Is an intermediary such as a water bank necessary?
* Would a water bank be a statewide entity, or would it apply to specific basins?
* Should a water bank operate year-round, during a growing season, or only during droughts?
* How would a water bank protect the water rights of users who are not part of the water bank from adverse effects?

As part of a wide-ranging water study, the 2004 Environmental Quality Council studied some aspects of water banking in Montana. The EQC decided that while water banking works in some states, Montana has water marketing alternatives in place and there was no need to add more. The panel also found that Montana lacks the physical strictures needed for water banking in the state.[47]

[47] http://leg.mt.gov/content/publications/environmental/2005waterreport.pdf.

Additional Information

Two publications that examine water marketing in Montana are "Private Water Leasing: A Montana Approach", produced by Trout Unlimited,[48] and "Saving our Streams: Harnessing Water Markets," produced by the Property and Environmental Research Center.[49]

Much of the information about water banks in this report comes from the "Analysis of Water Banks in the Western States," a 2004 report from the Washington Department of Ecology and WestWater Research.[50]

In 2005, the Montana Water Center at Montana State University-Bozeman oversaw a student analysis of water banking in western states.[51]

[48] http://www.tu.org/atf/cf/%7B0D18ECB7-7347-445B-A38E-65B282BBBD8A%7D/MT_WaterReport.pdf.

[49] http://www.perc.org/pdf/sas_2007.pdf.

[50] http://www.ecy.wa.gov/biblio/0411011.html.

[51] http://leg.mt.gov/content/committees/interim/2007_2008/water_policy/staffmemos/watermarketing101.pdf.

On the Road

From the outset, the Water Policy Committee wanted to hear from Montanans most affected by water issues. They decided to visit closed basins—areas where the issuance of new permits may be limited because of concerns about water quantity.

The committee held meetings in Dillon, Bozeman, Thompson Falls, Choteau, and Hamilton. At each meeting, panelists discussed issues outlined in the House Bill No. 304 study, but local perspectives also were given.

At the Dillon meeting, the committee heard overviews of many of the key water issues in Montana and how water is managed in other western states. They also reviewed staff research on the history of closed basins and legal issues, including implications of the Trout Unlimited decision.

Presentations from John Tubbs of DNRC, David Schmidt of Water Rights Solutions, hydrologist Jim Potts of HKM Engineering, and Cindy Younkin, a water rights attorney, compared mitigation, augmentation, and aquifer recharge options and alternatives for applying the concepts in Montana water law.

Another panel explained methods for the management of water to ensure compliance with closed basin law, including the artificial recharge of ground water. Those speakers included Rich Moy of the DNRC, Steve Kilbreath of the DEQ, consultant John Westenberg of PBS&J, hydrologist Michael Nicklin, and attorney Bill Hritsco.

To see some of these issues on the ground, the committee toured the area with stops at the Clark Canyon Dam, the East Bench Irrigation Diversion, the Tash Ranch, Schuett Farms, and Cottom Farms.

WPIC tour of the Beaverhead Valley.
Photo by Cynthia Peterson.

Water quality was a main theme at the Bozeman meeting.

The WPIC was asked to analyze water quality testing requirements to ensure

that the use of mitigation, augmentation, or aquifer recharge does not adversely affect ground water quality. Panelists included Tom Reid of the DEQ, Julie DalSoglio of the EPA, John Tubbs of the DNRC, MSU geologist Steve Custer, Kate Miller of the DEQ, MSU microbiologist Tim Ford, MSU civil engineer Warren Jones, research hydrologist Gary Icopini of MBMG, John Metesh of MBMG, and Tom Patton of MBMG.

The committee also wanted to know if potential applicants are provided with a clear process to follow that ensures the protection of water quality and prior appropriators while allowing development in Montana. Speaking to that issue were attorney Russ McElyea of Moonlight Basin Ranch, Gallatin County Planner Greg Sullivan, Tim Roark, the Gallatin County director of environmental health, and Holly Franz of PPL Montana.

WPIC tour of the Gallatin Valley.
Photo by Cynthia Peterson.

Tom Reid of the DEQ, Julie DalSoglio of the EPA, John Tubbs of the DNRC, MSU geologist Steve Custer, Kate Miller of the DEQ, MSU microbiologist Tim Ford, MSU civil engineer Warren Jones, research hydrologist Gary Icopini of MBMG, John Metesh of MBMG, and Tom Patton of MBMG spoke about water quality associated with storage or introduction of surface water to ground water resources.

Also at the Bozeman meeting, the committee heard about other issues related to mitigation, augmentation, or aquifer recharge in Montana to facilitate continued economic development and growth while providing reasonable protections to senior appropriators and water quality of surface and ground water resources. Panelists included attorney Russ McElyea of Moonlight Basin Ranch, Gallatin County Planner Greg Sullivan, Tim Roark, the Gallatin County director of environmental health, and Holly Franz of PPL Montana.

The WPIC toured the Upper Missouri and Gallatin Valley. Alan English, the manager of the Gallatin Local Water Quality District, provided an overview of the basins. The tour included the following sites:

- Utility Solutions, including the water supply and sewage treatment facilities.
- Flying A Holdings, including the aquifer storage and recovery water supply system and water quality testing.
- JTL Gravel Pit, examining the relation of ground water to surface

water, and the issues of water quality and water right permit requirements.

• City of Manhattan, including the municipal water supply and sewage treatment facilities.

Additional photos from the Dillon and Bozeman tours are available at www.leg.mt.gov/water

In September of 2007, the committee went to Thompson Falls. Topics discussed there included aquifer recharge and mitigation, in addition to exempt wells and enforcement. Topics of regional interest included discussion of the Milltown Dam water rights and an update on the Clark Fork Task Force by Gerald Mueller. John Carter of the Confederated Salish and Kootenai Tribes gave an update on the water rights compact negotiation.

The Choteau meeting included a presentation by the Teton River Watershed Group as well as a hydrologic overview of the Teton River by the DNRC. Water Court Judge Bruce Loble and others discussed adjudication in the area.

The January meeting in Hamilton was the committee's first look at possible legislation. Several residents of the area provided comments.

WPIC Study Tasks & Responses

Introduction

The 2007-08 Water Policy Interim Committee (WPIC) conducted a detailed study of water quantity, water quality, and water use in Montana. House Bills 304 and 831, both passed in the 2007 Legislature, defined the scope of the study. Many issues in the study related to issues in closed basins but also could have statewide implications.

This document details how the WPIC addressed each assigned study tasks. This is only a brief outline of the issues the WPIC analyzed. More documentation, including minutes of meetings and all documents received by the committee, are available at: www.leg.mt.gov/water

Assigned Study Tasks

1. Study Task: Review current Montana law related to mitigation, augmentation, or aquifer recharge.

WPIC Response: Reviewed staff research on HB 831 issues and legal analysis of related cases. Received regular updates from the DNRC on rulemaking and implementation of HB 831 provisions. Heard public comment on HB 831 provisions, including presentations from applicants dealing with the new law.

Presentations in June 2008 by DNRC, the MBMG, and Dave Pruitt, an irrigator and former water commissioner on the effects of different types of irrigation.

2. Study Task: Analyze other states' laws and rules related to mitigation, augmentation, or aquifer recharge and the other states' experiences with applying and using mitigation, augmentation, and aquifer recharge.

WPIC Response: Reviewed staff comparison of water management in Arizona, Colorado, Idaho, and Washington. Panel discussion in July 2007 included presentations from DNRC, DEQ, consultants, hydrologists, and attorneys involved in various aspects of water use in Montana. In September 2007, a review of aquifer storage and recovery in Washington by Linton Wildrick of the Pacific Groundwater Group. In March 2008, John Metesh presented a summary of an aquifer storage, recovery and recharge seminar he attended.

3. Study Task: Compare mitigation, augmentation, and aquifer recharge options and alternatives for applying the concepts in Montana water law.

WPIC Response: Panel discussion in July 2007 included presentations from John Tubbs of DNRC, David Schmidt of Water Rights Solutions, hydrologist Jim Potts of HKM Engineering, and

Cindy Younkin, a water rights attorney. In September 2007, Kirk Waren of the MBMG discussed the feasibility of aquifer storage and recovery in Montana. Presentation in April 2008 of the Ruby Valley Groundwater Management Plan by KirK Engineering and Ann Schwend, the Ruby Watershed Coordinator. Presentations in June by DNRC, the MBMG, and Dave Pruitt, an irrigator and former water commissioner on the effects of different types of irrigation.

4. Study Task: Analyze water quality testing requirements to ensure that the use of mitigation, augmentation, or aquifer recharge does not adversely affect ground water quality.

WPIC Response: Panel presentations in August 2007 from Tom Reid of the DEQ, Julie DalSoglio of the EPA, John Tubbs of the DNRC, MSU geologist Steve Custer, Kate Miller of the DEQ, MSU microbiologist Tim Ford, MSU civil engineer Warren Jones, research hydrologist Gary Icopini of MBMG, John Metesh of MBMG, and Tom Patton of MBMG.

Presentation in June 2008 by Eric Regensburger of the DEQ on water quality issues.

5. Study Task: Analyze data developed to determine the type and amount of research, data, and analysis necessary to develop a scientifically defensible hydrogeologic assessment to be used in making informed decisions with regard to mitigation, augmentation, or aquifer recharge activity in Montana.

WPIC Response: Multiple presentations from the MBMG study regarding potential ground water withdrawal impacts on surface water and the adequacy of any additional recommended minimum standards and criteria for hydrogeologic assessments. Presentation in June 2008 of report commissioned by the Montana Association of Realtors.

6. Study Task: Study appropriate monitoring requirements to determine the effectiveness of mitigation, augmentation, or aquifer recharge plans.

WPIC Response: Presentations in September 2007 from Dr. William Woessner, professor of hydrology at the University of Montana, Russell Levens, a DNRC hydrologist, Kate Miller from the DEQ, and a water user, Randy Overton of RLK Hydro. Presentation on cumulative impact on water quantity in September 2007 from Mike Roberts, a DNRC surface water hydrologist, Steve Fry of Avista, a senior appropriator, and an applicant, Marc Spratt of RLK Hydro, Inc.

7. Study Task: Identify gaps in data necessary to determine appropriate locations to conduct artificial recharge of ground water.

WPIC Response: Presentations from various experts. Presentation in April 2008 of the Ruby Valley Groundwater Management Plan by Kirk Engineering and Ann Schwend, the Ruby Watershed Coordinator. Presentations in June by DNRC, the MBMG, and Dave Pruitt, an irrigator and former water commissioner on the effects of different types of irrigation.

8. Study Task: Examine other issues related to mitigation, augmentation, or aquifer recharge in Montana to facilitate continued economic development and growth while providing reasonable protections to senior appropriators and water quality of surface and ground water resources.

WPIC Response: Panel presentations in August 2007 from attorney Russ McElyea of Moonlight Basin Ranch, Gallatin County Planner Greg Sullivan, Tim Roark, the Gallatin County director of environmental health, and Holly Franz of PPL Montana.

Multiple presentations from the MBMG study regarding potential ground water withdrawal impacts on surface water and the adequacy of any additional recommended minimum standards and criteria for hydrogeologic assessments.

Presentation in April 2008 of the Ruby Valley Groundwater Management Plan by Kirk Engineering and Ann Schwend, the Ruby Watershed Coordinator. Presentations in June by DNRC, the MBMG, and Dave Pruitt, an irrigator and former water commissioner on the effects of different types of irrigation.

9. Study Task: Study methods for the management of water to ensure compliance with closed basin law, including the artificial recharge of ground water.

WPIC Response: Reviewed staff research on the history of closed basins and legal issues, including implications of Trout Unlimited decision. Presentations in July 2007 from Rich Moy of the DNRC, Steve Kilbreath of the DEQ, consultant John Westenberg of PBS&J, hydrologist Michael Nicklin, and attorney Bill Hritsco. Presentation in March 2008 from Michelle Bryan Mudd, a UM law professor, on land use and water law.

Presentation in April 2008 of the Ruby Valley Groundwater Management Plan by KirK Engineering and Ann Schwend, the Ruby Watershed Coordinator. Presentations in June by DNRC, the MBMG, and Dave Pruitt, an irrigator and former water commissioner on the effects of different types of irrigation.

10. Study Task: Review drinking water standards and effluent treatment standards in other jurisdictions and recommend appropriate treatment standards for the purposes of aquifer recharge and mitigation.

WPIC Response: Presentations in September from Randy Overton of RLK Hydro, and Kate Miller from the DEQ.

11. Study Task: Identify research necessary, if any, to determine alternatives and options for conducting water management through artificial recharge of ground water.

WPIC Response: Presentation in August 2007 by Tom Reid of the DEQ. Presentations in September from Randy Overton of RLK Hydro, and Kate Miller from the DEQ.

12. Study Task: Conduct a water quality analysis associated with storage or introduction of surface water to ground water resources.

WPIC Response: Panel presentations in August 2007 from Tom Reid of the DEQ, Julie DalSoglio of the EPA, John Tubbs of the DNRC, MSU geologist Steve Custer, Kate Miller of the DEQ, MSU microbiologist Tim Ford, MSU civil engineer Warren Jones, research hydrologist Gary Icopini of MBMG, John Metesh of MBMG, and Tom Patton of MBMG.

13. Study Task: Identify the extent to which cumulative impacts are analyzed from a water quantity and a water quality perspective and whether or not the two findings are assessed jointly and determine the appropriate level of coordination.

WPIC Response: Presentations in September 2007 from Dr. William Woessner, professor of hydrology at the University of Montana, Russell Levens, a DNRC hydrologist, Kate Miller from the DEQ and a water user, Randy Overton of RLK Hydro. Presentation on cumulative impact on water quantity in September 2007 from Mike Roberts, a DNRC surface water hydrologist, Steve Fry of Avista, a senior appropriator, and an applicant, Marc Spratt of RLK Hydro, Inc.

14. Study Task: Determine an appropriate, accurate, and time-efficient process for coordinating water quality requirements with the water appropriations process.

WPIC Response: Presentations in September 2007 from Bonnie Lovelace of the DEQ, land use attorney Myra Shults, Sanders County sanitarian Barbara Woodbury, and Jim Carlson, the environmental health director for Missoula County. Multiple presentations from DEQ and DNRC. Convened a work group of interested parties.

Formed a work group in 2008 of more than 20 participants that met twice in an effort to find consensus on various issues before the committee.

15. Study Task: Evaluate how the Department of Environmental Quality and the Department of Natural Resources and Conservation issue permits that affect ground water or surface water quality and whether or not the water appropriation process and the water quality process are coordinated.

WPIC Response: Presentations in September 2007 from Bonnie Lovelace of the DEQ, land use attorney Myra Shults, Sanders County sanitarian Barbara Woodbury, and Jim Carlson, the environmental health director for Missoula County. Multiple presentations from DEQ and DNRC. Convened a work group of interested parties.

Formed a work group in 2008 of more than 20 participants that met twice in an effort to find consensus on various issues before the committee.

16. Study Task: Determine if potential applicants are provided with a clear process to follow that ensures the protection of water quality and prior appropriators while allowing development in Montana.

WPIC Response: Panel presentations in August 2007 from attorney Russ McElyea of Moonlight Basin Ranch, Gallatin County Planner Greg Sullivan, Tim Roark, the Gallatin County director of environmental health, and Holly Franz of PPL Montana. A January 2008 presentation from Lee Wolfe of East Gate Village in East Helena. Multiple presentations from DEQ and DNRC. Convened a work group of interested parties.

Presentation in June of Bostwick case in Gallatin County where DNRC was ordered to issue a permit, despite various concerns, because the agency violated time limits for reviewing the application.

Formed a work group in 2008 of more than 20 participants that met twice in an effort to find consensus on various issues before the committee.

17. Study Task: Determine the number of exempt wells in Montana and estimate of the number of exempt wells expected to be developed by 2020.

WPIC Response: Presentation in September 2007 from Curt Martin of the DNRC, as well as presentations from other DNRC staff, DEQ, the Montana Association of Realtors, and the Montana Building Industry Association.

18. Study Task: Determine the types of beneficial uses to which water from exempt wells is applied.

WPIC Response: September 2007 report from Curt Martin of the DNRC.

19. Study Task: Evaluate the hydrogeologic analysis necessary to determine consumptive use on a per-acre or fraction-of-an-acre basis and on a per-use basis.

WPIC Response: October 2007 presentations by John LaFave of the Montana Bureau of Mines and Geology and Bill Uthman, a DNRC hydrogeologist.

20. Study Task: Analyze the amount of water reasonably necessary for the various beneficial uses and compare the reasonable use standard with current statutory limits, including volume, flow rate, and other criteria that the committee determines are necessary to provide for accurate and adequate measurement of water use through exempt wells.

WPIC Response: Presentations in October 2007 from Eric Regensburger of the DEQ, Larry Dolan of the DNRC, and Dr. Steve Custer, professor of geology at MSU.

21. Study Task: Examine options and alternatives for enforcing statutory limitations regarding exempt well usage.

WPIC Response: October 2007 presentations from Tim Hall, DNRC legal counsel, Dustin Stewart of the Montana Building Industry Association, and John Youngberg of the Montana Farm Bureau Federation.

22. Study Task: Determine the necessity and reasons for providing a process that is exempt from the permitting.

WPIC Response: October 2007 presentations from Dustin Stewart of the Montana Building Industry Association, Glenn Oppel of the Montana Association of Realtors, John Youngberg of the Montana Farm Bureau Federation, Rich Moy of the DNRC, and Laura Ziemer of Trout Unlimited.

23. Study Task: Analyze water marketing and water reallocation options available in Montana, including the leasing of water rights, water banking, water trading, and water sales; the lease-to-sale ratio of water rights; the number of market purchases completed; the purposes of water trades or sales; the feasibility of creating and operating a water bank; and the administrative procedures and costs necessary to establish and operate a water bank.

WPIC Response: Reviewed staff research on applicable Montana laws as well as an overview of water banking options. Presentations from the Departments of Natural Resources and Conservation and Fish, Wildlife, and Parks, as well as from Property and Environment Research Center, the Montana Water Trust, Trout Unlimited, the Farm Bureau Federation, and the Bureau of Reclamation.

24. Study Task: Gather appropriate information that the committee determines is necessary to make sound and well-reasoned policy decisions to guide the management and use of Montana's ground water resource into the future.

WPIC Response: The WPIC held 10 meetings over the interim. In addition to Helena meetings, the WPIC visited Dillon, Bozeman, Thompson Falls, Choteau, and Hamilton. Each meeting included testimony from various water experts, agency personnel, and interested members of the public. The WPIC addressed each study task assigned by the Legislature and delved into other areas not specifically referenced by the enabling legislation.

Formed a work group in 2008 of more than 20 participants that met twice in an effort to find consensus on various issues before the committee.

June 2008 presentation by Anna Miller of the DNRC on various funding programs available for community water and sewer systems.

Presentation in April 2008 of the Ruby Valley Groundwater Management Plan by KirK Engineering and Ann Schwend, the Ruby Watershed Coordinator. Presentations in June by the DNRC, the MBMG, and Dave Pruitt, an irrigator and former water commissioner on the effects of different types of irrigation.

25. Study Task: Present long-term goals and policy proposals for water management related to ground water resources.

WPIC Response: The WPIC held 10 meetings over the interim. In addition to Helena meetings , the WPIC visited Dillon, Bozeman, Thompson Falls, Choteau, and Hamilton. Each meeting included testimony from various water experts, agency personnel and interested members of the public. The WPIC addressed each study task assigned by the Legislature and delved into other areas not specifically referenced by the enabling legislation.

26. Study Task: Submit a report to the 61st Legislature that provides clear policy direction and necessary legislation to guide Montana's water policy and that ensures fair and reasonable use of Montana's water resource as demands on water increase while supplies remain the same or decrease.

WPIC Response: Held meetings in closed basins where demands on water supplies are highest in an effort to elicit concerns about water management from those who deal with the issue daily. Reviewed research, solicited expert opinions and debated policy options throughout the interim.

Reviewed process for developing the state water plan.

Formed a subcommittee with the Environmental Quality Council to debate options for making water policy a permanent interim study issue.

Other Issues Examined

1. General Enforcement of Water Rights

WPIC Response: Presentations in April 2008 from Water Court Judge Bruce Loble, DNRC legal counsel Candy West, Sarah Bond of the Attorney General's office, Gallatin County Attorney Marty Lambert, and Lezlie Kinne, a water commissioner.

2. The Growing Communities Doctrine

WPIC Response: Presentations in March 2008 from Greg Petesch, WPIC attorney, Elena Zlatnik of Mountain Water, and Candy West, DNRC legal counsel.

3. Instream Flows and Fishing Closures

WPIC Response: Presentation in January 2008 from Bill Schenk of the Department of Fish, Wildlife, and Parks.

4. Opencut Mining

WPIC Response: The WPIC discussed opencut mining in April 2008 as it relates to water quality as well as permitting. The DEQ explained the ramifications of recent court decisions, and two residents of Gallatin County provided testimony.

HOUSE BILL NO. 831

INTRODUCED BY MCNUTT, POMNICHOWSKI, COHENOUR, VAN DYK, SMALL-EASTMAN

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING WATER LAWS IN CLOSED BASINS; DEFINING TERMS IN WATER USE LAWS; AMENDING REQUIREMENTS FOR AN APPLICATION TO APPROPRIATE GROUND WATER IN A CLOSED BASIN; PROVIDING THAT CERTAIN APPLICATIONS TO APPROPRIATE SURFACE WATER ARE EXEMPT FROM CLOSED BASIN REQUIREMENTS; PROVIDING REQUIREMENTS FOR HYDROGEOLOGIC ASSESSMENTS, MITIGATION PLANS, AND AQUIFER RECHARGE PLANS; PROVIDING MINIMUM WATER QUALITY STANDARDS FOR CERTAIN DISCHARGES OF EFFLUENT; ~~REQUIRING THAT PREVIOUSLY APPROVED PLANS THAT WERE NOT LOCATED IN THE CLARK FORK BASIN MUST MEET CERTAIN CRITERIA;~~ REQUIRING THAT DATA BE SUBMITTED TO THE BUREAU OF MINES AND GEOLOGY; PROVIDING FOR RULEMAKING; PROVIDING FOR A CASE STUDY AND REQUIREMENTS AND A FEE FOR PARTICIPATION IN THE CASE STUDY; ~~RECOGNIZING AND CONFIRMING EXISTING APPROPRIATION RIGHTS IN CERTAIN INSTANCES;~~ PROVIDING AN APPROPRIATION; AMENDING SECTIONS 85-2-102, 85-2-302, 85-2-311, 85-2-329, 85-2-330, 85-2-335, 85-2-336, ~~85-2-337,~~ 85-2-340, 85-2-341, 85-2-342, 85-2-343, 85-2-344, ~~85-2-402,~~ AND 85-2-506, MCA; REPEALING SECTION 85-2-337, MCA; DIRECTING THE AMENDMENT OF ARM 36.12.101 AND 36.12.120; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND ~~APPLICABILITY DATES~~ AN APPLICABILITY DATE."

WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior

appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. (Temporary) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436; ~~or~~

(d) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation as provided in [sections ~~15~~ 14 and ~~17~~ 16]; or

(f) a use of water for an aquifer storage and recovery project as provided in [section 20].

(2) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or

controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset ADVERSE EFFECTS RESULTING FROM net depletion of surface water ~~in a closed basin resulting from a new appropriation right or certain changes in an appropriation right~~.

(3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for ~~maintenance or enhancement of the streamflow~~ A BENEFICIAL USE.

~~(2)~~(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, ~~(including~~ stock water~~)~~, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436; ~~or~~

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation as provided in [sections ~~15~~ 14 and ~~17~~ 16]; or

(f) a use of water for an aquifer storage and recovery project as provided in [section 20].

~~(3)~~(5) "Certificate" means a certificate of water right issued by the department.

~~(4)~~(6) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

~~(5)~~(7) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

~~(6)~~(8) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

~~(7)~~(9) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

~~(8)~~(10) "Department" means the department of natural resources and conservation provided for in Title

2, chapter 15, part 33.

~~(9)~~(11) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

~~(10)~~(12) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

~~(11)~~(13) "Ground water" means any water that is beneath the ground surface.

~~(12)~~(14) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(15) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset ADVERSE EFFECTS RESULTING FROM net depletion of surface water ~~in a closed basin resulting from a new appropriation right or certain changes in an appropriation right~~.

(16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

~~(13)~~(17) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(14)~~(18) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

~~(15)~~(19) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

~~(16)~~(20) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

~~(17)~~(21) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

~~(18)~~(22) "Substantial credible information" means probable, believable facts sufficient to support a

reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(19)~~(23) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(20)~~(24) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(21)~~(25) "Water division" means a drainage basin as defined in 3-7-102.

~~(22)~~(26) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(23)~~(27) "Water master" means a master as provided for in Title 3, chapter 7.

~~(24)~~(28) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

~~(25)~~(29) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)

85-2-102. (Effective July 1, 2009) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; ~~or~~

(c) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(d) a use of water for aquifer recharge or mitigation as provided in [sections ~~15~~ 14 and ~~17~~ 16]; or

(e) a use of water for an aquifer storage and recovery project as provided in [section 20].

(2) "Aquifer recharge" means either controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset ADVERSE EFFECTS RESULTING FROM net depletion of surface water ~~in a closed basin resulting from a new appropriation right or certain changes in an appropriation right~~.

(3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain

fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for ~~maintenance or enhancement of the streamflow~~ A BENEFICIAL USE.

~~(2)~~(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, ~~(including~~ stock water~~)~~, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; ~~or~~

(c) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(d) a use of water for aquifer recharge or mitigation as provided in [sections ~~15~~ 14 and ~~17~~ 16]; or

(e) a use of water for an aquifer storage and recovery project as provided in [section 20].

~~(3)~~(5) "Certificate" means a certificate of water right issued by the department.

~~(4)~~(6) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

~~(5)~~(7) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

~~(6)~~(8) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

~~(7)~~(9) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

~~(8)~~(10) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

~~(9)~~(11) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

~~(10)~~(12) "Ground water" means any water that is beneath the ground surface.

~~(11)~~(13) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(14) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset ADVERSE EFFECTS RESULTING FROM net depletion of surface water ~~in a closed basin resulting from a new appropriation right or certain changes in an appropriation right~~.

(15) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

~~(12)~~(16) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(13)~~(17) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

~~(14)~~(18) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

~~(15)~~(19) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

~~(16)~~(20) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

~~(17)~~(21) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(18)~~(22) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(19)~~(23) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

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~~(23)~~(27) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

~~(24)~~(28) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-302, MCA, is amended to read:

"85-2-302. Application for permit. (1) Except as provided in 85-2-306 and ~~for the purpose of test wells for conducting the hydrogeologic assessment and monitoring pursuant to [sections 15 through 17 and 22]~~ [SECTION 21], a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the department.

(2) The department shall adopt rules that are necessary to determine whether or not an application is correct and complete, based on the provisions applicable to issuance of a permit under this part. The rules must be adopted in compliance with Title 2, chapter 4.

(3) The application must be made on a form prescribed by the department. The department shall make the forms available through its offices.

(4) The applicant shall submit a correct and complete application. The determination of whether an application is correct and complete must be based on rules adopted under subsection (2) that are in effect at the time the application is submitted.

(5) The department shall notify the applicant of any defects in an application within 180 days. The defects must be identified by reference to the rules adopted under subsection (2). If the department does not notify the applicant of any defects within 180 days, the application must be treated as a correct and complete application.

(6) An application does not lose priority of filing because of defects if the application is corrected or completed within 30 days of the date of notification of the defects or within a further time as the department may allow, but not to exceed 90 days from the date of notification. If an application is made correct and complete after the mandated time period, but within 90 days of the date of notification of the defects, the priority date of the application is the date the application is made correct and complete.

(7) An application not corrected or completed within 90 days from the date of notification of the defects is terminated."

Section 3. Section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. (1) A permit may be issued under this part prior to the adjudication of existing water rights in a source of supply. In a permit proceeding under this part, there is no presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the adjudication of existing water rights pursuant to this chapter. In making a determination under this section, the department may not alter the terms and conditions of an existing water right or an issued certificate, permit, or state water reservation. Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source

of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

(3) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

(a) the criteria in subsection (1) are met;

(b) the proposed appropriation is a reasonable use. A finding must be based on a consideration of the following:

(i) the existing demands on the state water supply, as well as projected demands, such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (4) must be

met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(ii) and (4)(b)(iii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(5) ~~To~~ Subject to [section ~~15~~ 14], to meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, ~~MODELING INFORMATION,~~ field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.

(6) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or

control waters within the boundaries of this state except in accordance with this section.

(7) The department may adopt rules to implement the provisions of this section.

(8) FOR AN APPLICATION FOR GROUND WATER IN A BASIN CLOSED PURSUANT TO 85-2-330, 85-2-336, 85-2-341, 85-2-343, OR 85-2-344 OR DURING THE PERIOD OF CLOSURE FOR ANY BASIN THAT IS ADMINISTRATIVELY CLOSED PURSUANT TO 85-2-319, THE APPLICANT SHALL COMPLY WITH THE PROVISIONS OF [SECTION 14] IN addition TO THE REQUIREMENTS OF THIS SECTION."

Section 4. Section 85-2-329, MCA, is amended to read:

"85-2-329. Definitions. Unless the context requires otherwise, in 85-2-330 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

~~(3)~~(2) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

~~(4)~~(3) "Teton River basin" means the drainage area of the Teton River and its tributaries above the confluence of the Teton and Marias Rivers."

Section 5. Section 85-2-330, MCA, is amended to read:

"85-2-330. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not ~~process or~~ grant an application for a permit to appropriate water or for a reservation to reserve water within the Teton River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water if the applicant complies with the provisions of [section ~~15~~ 14];

(b) an application for a permit to appropriate water for a nonconsumptive use;

(c) an application for a permit to appropriate water for:

(i) domestic use from surface water or pursuant to 85-2-306;; ~~municipal, or~~

(ii) stock use; or

(iii) use OF SURFACE WATER by OR FOR a municipality;

(d) an application to store water during high spring flows; ~~or~~

(e) ~~emergency~~ temporary emergency appropriations as provided for in 85-2-113(3); or

(f) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required for:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

(ii) aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.

(3) A permit issued to conduct remedial actions or aquatic resource activities under subsection (2)(f) may not be used for dilution.

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b), (2)(c), (2)(e), or (2)(f)."

SECTION 6. SECTION 85-2-335, MCA, IS AMENDED TO READ:

"85-2-335. Definitions. Unless the context requires otherwise, in 85-2-335, ~~through~~ 85-2-336, and 85-2-338, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302.

(2) "Upper Clark Fork River basin" means the drainage area of the Clark Fork River and its tributaries above Milltown dam."

Section 7. Section 85-2-336, MCA, is amended to read:

"85-2-336. Basin closure -- exception. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not ~~process or~~ grant an application for a permit to appropriate water within the Upper Clark Fork River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water if the applicant complies with the provisions of [section ~~15~~ 14];

(b) ~~an application filed prior to January 1, 2000, for a permit to appropriate water to conduct response actions or remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not be used for dilution and must be limited to a term not to exceed the necessary time to complete the response or remedial action, and the permit may not be transferred to any person for any purpose other than the designated response or remedial action~~ an application for a permit to appropriate surface water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387. A permit issued to conduct aquatic resource actions may not be used for dilution.

(c) an application for a permit to appropriate water for stock use;

(d) an application to store water; or

(e) an application for power generation at existing hydroelectric dams. The department may not approve a permit for power generation if approval results in additional consumption of water.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b) or (2)(c).

(4) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water reservation application does not provide standing to object under 85-2-402.

~~(4)~~(5) The department may not process or approve applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316."

~~**Section 7.** Section 85-2-337, MCA, is amended to read:~~

~~"**85-2-337. Ground water permit applications -- report required.** (1) During the period of basin closure provided in 85-2-336(1), an applicant for a ground water permit in the Upper Clark Fork River basin shall submit a report prepared by a professional engineer or hydrologist addressing the hydrologic connection between the source of the ground water and surface water. If the applicant fails to submit the report required in this section, the application is considered defective and must be processed pursuant to 85-2-302 comply with the provisions of [section 15].~~

~~(2) Except as provided in subsection (3), the department may not issue a permit to appropriate ground~~

~~water in the Upper Clark Fork River basin unless the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the source of the ground water is not a part of or substantially or directly connected to surface water.~~

~~(3)~~(2) ~~The department may issue a permit to appropriate ground water if the application includes an augmentation plan and if the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the augmentation plan provides sufficient augmentation water in amount, time, and location to replace depletions to senior water rights~~ pursuant to [section 15]~~."~~

Section 8. Section 85-2-340, MCA, is amended to read:

"85-2-340. Definitions. Unless the context requires otherwise, in 85-2-341 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(2) "Ground water" ~~means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water~~ has the meaning provided in 85-2-102.

(3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above the confluence of the Jefferson and Missouri Rivers.

(4) "Madison River basin" means the drainage area of the Madison River and its tributaries above the confluence of the Madison and Jefferson Rivers.

(5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions."

Section 9. Section 85-2-341, MCA, is amended to read:

"85-2-341. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not ~~process or~~ grant an application for a permit to appropriate water or for a state water reservation to reserve water within the Jefferson River basin or Madison River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water if the applicant complies with the provisions

of [section ~~15~~ 14];

(b) an application for a permit to appropriate water for a nonconsumptive use;

(c) an application for a permit to appropriate water for:

(i) domestic use from surface water or pursuant to 85-2-306;~~; municipal, or~~

(ii) stock use; or

(iii) use OF SURFACE WATER by OR FOR a municipality;

(d) an application to store water during high spring flows; ~~or~~

(e) temporary emergency appropriations as provided for in 85-2-113(3); or

(f) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required for:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

(ii) aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.

(3) A permit issued to conduct remedial actions or aquatic resource activities under subsection (2)(f) may not be used for dilution.

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b), (2)(c), (2)(e), or (2)(f)."

Section 10. Section 85-2-342, MCA, is amended to read:

"85-2-342. Definitions. Unless the context requires otherwise, in 85-2-343 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

~~(3)~~(2) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

~~(4)~~(3) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony dam."

Section 11. Section 85-2-343, MCA, is amended to read:

"85-2-343. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not ~~process or~~ grant an application for a permit to appropriate water or for a reservation to reserve water within the upper Missouri River basin until the final decrees have been issued in accordance with part 2 of this chapter for all of the subbasins of the upper Missouri River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water if the applicant complies with the provisions of [section ~~15~~ 14];

(b) an application for a permit to appropriate water for a nonconsumptive use;

(c) an application for a permit to appropriate water for:

(i) domestic use from surface water or pursuant to 85-2-306;; ~~municipal, or~~

(ii) stock use; or

(iii) use OF SURFACE WATER by OR FOR a municipality;

(d) an application to store water during high spring flows;

(e) an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help control erosion in the Muddy Creek drainage; ~~or~~

(f) temporary emergency appropriations as provided for in 85-2-113(3); or

(g) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required for:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

(ii) aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.

(3) A permit issued to conduct remedial actions or aquatic resource activities under subsection (2)(g) may not be used for dilution.

(4) A change of use authorization for changing the purpose of use may not be issued for any permit

issued pursuant to subsection (2)(b), (2)(c), (2)(e), (2)(f), or (2)(g)."

Section 12. Section 85-2-344, MCA, is amended to read:

"85-2-344. Bitterroot River subbasin temporary closure -- definitions -- exceptions. (1) Unless the context requires otherwise, in this section, the following definitions apply:

(a) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(b) "Bitterroot River basin" means the drainage area of the Bitterroot River and its tributaries above the confluence of the Bitterroot River and Clark Fork of the Columbia River and designated as "Basin 76H".

(c) "Bitterroot River subbasin" means one of the following hydrologically related portions of the Bitterroot River basin:

(i) the mainstem subbasin, designated as "Subbasin 76HA";

(ii) the north end subbasin, designated as "Subbasin 76HB";

(iii) the east side subbasin, designated as "Subbasin 76HC";

(iv) the southeast subbasin, designated as "Subbasin 76HD";

(v) the south end subbasin, designated as "Subbasin 76HE";

(vi) the southwest subbasin, designated as "Subbasin 76HF";

(vii) the west central subbasin, designated as "Subbasin 76HG"; or

(viii) the northwest subbasin, designated as "Subbasin 76HH".

(2) As provided in 85-2-319, the department may not ~~process or~~ grant an application for a permit to appropriate water or for a state water reservation within a Bitterroot River subbasin until the closure for the basin is terminated pursuant to subsection (3) of this section, except for:

(a) an application for a permit to appropriate ground water if the applicant complies with the provisions of [section ~~15~~ 14];

(b) an application for a permit to appropriate water for ~~a municipal water supply~~ use OF SURFACE WATER by OR FOR a municipality;

(c) temporary emergency appropriations pursuant to 85-2-113(3); ~~or~~

(d) an application to store water during high spring flow in an impoundment with a capacity of 50 acre-feet or more; or

(e) an application for a permit to appropriate surface water to conduct response actions related to natural

resource restoration required for:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

(ii) aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.

(3) A permit issued to conduct remedial actions or aquatic resource activities under subsection (2)(e) may not be used for dilution

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b), (2)(c), or (2)(e).

~~(3)~~(5) Each Bitterroot River subbasin is closed to new appropriations and new state water reservations until 2 years after all water rights in the subbasin arising under the laws of the state are subject to an enforceable and administrable decree as provided in 85-2-406(4)."

~~**Section 13.** Section 85-2-402, MCA, is amended to read:~~

~~"**85-2-402. (Temporary) Changes in appropriation rights.** (1) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.~~

~~(2) Except as provided in subsections (4) through (6), (15), and (16) and subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:~~

~~(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.~~

~~(b) Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408, the~~

~~proposed means of diversion, construction, and operation of the appropriation works are adequate.~~

~~(c) The proposed use of water is a beneficial use.~~

~~(d) Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.~~

~~(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.~~

~~(f) The water quality of an appropriator will not be adversely affected.~~

~~(g) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.~~

~~(3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.~~

~~(4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by a preponderance of evidence that:~~

~~(a) the criteria in subsection (2) are met; and~~

~~(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:~~

~~(i) the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;~~

~~(ii) the benefits to the applicant and the state;~~

~~(iii) the effects on the quantity and quality of water for existing uses in the source of supply;~~

~~(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;~~

~~(v) the effects on private property rights by any creation of or contribution to saline seep; and~~

~~(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.~~

~~(5) The department may not approve a change in purpose of use or place of use for a diversion that~~

~~results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:~~

~~(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (4) are met; and~~

~~(b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.~~

~~(6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:~~

~~(a) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:~~

~~(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (4) are met;~~

~~(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and~~

~~(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.~~

~~(b) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:~~

~~(i) whether there are present or projected water shortages within the state of Montana;~~

~~(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;~~

~~(iii) the supply and sources of water available to the applicant in the state where the applicant intends to~~

~~use the water; and~~

~~(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.~~

~~(c) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.~~

~~(7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it determines that the proposed change might adversely affect the rights of other persons.~~

~~(8) The department or the legislature, if applicable, may approve a change in appropriation right subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).~~

~~(9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed.~~

~~(10) If a change in appropriation right is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.~~

~~(11) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.~~

~~(12) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.~~

~~(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.~~

~~(14) The department may adopt rules to implement the provisions of this section.~~

~~(15) (a) An appropriator may change an appropriation right for a replacement well without the prior approval of the department if:~~

~~(i) the appropriation right is for:~~

~~(A) ground water outside the boundaries of a controlled ground water area; or~~

~~(B) ground water inside the boundaries of a controlled ground water area and if the provisions of the order declaring the controlled ground water area do not restrict such a change;~~

~~(ii) the change in appropriation right is to replace an existing well and the existing well will no longer be used;~~

~~(iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the well being replaced and do not exceed:~~

~~(A) 450 gallons a minute for a municipal well; or~~

~~(B) 35 gallons a minute and 10 acre-feet a year for all other wells;~~

~~(iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated from the well being replaced; and~~

~~(v) a timely, correct and complete notice of replacement well is submitted to the department as provided in subsection (15)(b).~~

~~(b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the appropriator shall file a notice of replacement well with the department on a form provided by the department.~~

~~(ii) The department shall review the notice of replacement well and shall issue an authorization of a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is correct and complete.~~

~~(iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of replacement well has been filed with the department. The department shall return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a further~~

~~time as the department may allow, not to exceed 6 months.~~

~~(iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:~~

~~(A) cease appropriation of water from the replacement well pending approval by the department; and~~

~~(B) submit an application for a change in appropriation right to the department pursuant to subsections (1) through (3).~~

~~(c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under 85-2-404.~~

~~(d) For each well that is replaced under this subsection (15), the appropriator shall follow the well abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-43-202.~~

~~(e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that meets the requirements of subsection (15)(a).~~

~~(16) (a) An appropriator may change an appropriation right without the prior approval of the department for the purpose of constructing a redundant water supply well in a public water supply system, as defined in 75-6-102, if the redundant water supply well:~~

~~(i) withdraws water from the same ground water source as the original well; and~~

~~(ii) is required by a state or federal agency.~~

~~(b) The priority date of the redundant water supply well is the same as the priority date of the original well. Only one well may be used at one time.~~

~~(c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of construction of the well with the department on a form provided by the department. The department may return a defective notice of construction to the appropriator for correction and completion.~~

~~(d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that meets the requirements of this section.~~

~~(17) For an application for a change in appropriation right for ground water or to ground water in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or during the period of closure for any basin that is administratively closed pursuant to 85-2-319, the applicant shall comply with the provisions of [section 15] in addition to the requirements of this section.~~ (Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)

~~**85-2-402. (Effective July 1, 2009) Changes in appropriation rights.** (1) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is~~

~~recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.~~

~~(2) Except as provided in subsections (4) through (6), (15), and (16)~~ and subject to subsection (17), ~~the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:~~

~~(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.~~

~~(b) Except for a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408, the proposed means of diversion, construction, and operation of the appropriation works are adequate.~~

~~(c) The proposed use of water is a beneficial use.~~

~~(d) Except for a temporary change in appropriation right authorization pursuant to 85-2-408, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.~~

~~(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.~~

~~(f) The water quality of an appropriator will not be adversely affected.~~

~~(g) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.~~

~~(3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.~~

~~(4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by a preponderance of evidence that:~~

~~(a) the criteria in subsection (2) are met; and~~

~~(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:~~

~~(i) the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;~~

~~(ii) the benefits to the applicant and the state;~~

~~(iii) the effects on the quantity and quality of water for existing uses in the source of supply;~~

~~(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;~~

~~(v) the effects on private property rights by any creation of or contribution to saline seep; and~~

~~(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.~~

~~(5) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:~~

~~(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (4) are met; and~~

~~(b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.~~

~~(6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:~~

~~(a) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public~~

~~hearings that:~~

~~(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (4) are met;~~

~~(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and~~

~~(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.~~

~~(b) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:~~

~~(i) whether there are present or projected water shortages within the state of Montana;~~

~~(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;~~

~~(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and~~

~~(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.~~

~~(c) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.~~

~~(7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it determines that the proposed change might adversely affect the rights of other persons.~~

~~(8) The department or the legislature, if applicable, may approve a change in appropriation right subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).~~

~~(9) Upon actual application of water to the proposed beneficial use within the time allowed, the~~

~~appropriator shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed.~~

~~(10) If a change in appropriation right is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.~~

~~(11) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.~~

~~(12) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.~~

~~(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.~~

~~(14) The department may adopt rules to implement the provisions of this section.~~

~~(15) (a) An appropriator may change an appropriation right for a replacement well without the prior approval of the department if:~~

~~(i) the appropriation right is for:~~

~~(A) ground water outside the boundaries of a controlled ground water area; or~~

~~(B) ground water inside the boundaries of a controlled ground water area and if the provisions of the order declaring the controlled ground water area do not restrict such a change;~~

~~(ii) the change in appropriation right is to replace an existing well and the existing well will no longer be used;~~

~~(iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the well being replaced and do not exceed:~~

~~(A) 450 gallons a minute for a municipal well; or~~

~~(B) 35 gallons a minute and 10 acre-feet a year for all other wells;~~

~~(iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated from the well being replaced; and~~

~~(v) a timely, correct and complete notice of replacement well is submitted to the department as provided in subsection (15)(b).~~

~~(b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the appropriator shall file a notice of replacement well with the department on a form provided by the department.~~

~~(ii) The department shall review the notice of replacement well and shall issue an authorization of a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is correct and complete.~~

~~(iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of replacement well has been filed with the department. The department shall return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.~~

~~(iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:~~

~~(A) cease appropriation of water from the replacement well pending approval by the department; and~~

~~(B) submit an application for a change in appropriation right to the department pursuant to subsections (1) through (3).~~

~~(c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under 85-2-404.~~

~~(d) For each well that is replaced under this subsection (15), the appropriator shall follow the well abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-43-202.~~

~~(e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that meets the requirements of subsection (15)(a).~~

~~(16) (a) An appropriator may change an appropriation right without the prior approval of the department for the purpose of constructing a redundant water supply well in a public water supply system, as defined in 75-6-102, if the redundant water supply well:~~

~~(i) withdraws water from the same ground water source as the original well; and~~

~~(ii) is required by a state or federal agency.~~

~~(b) The priority date of the redundant water supply well is the same as the priority date of the original well. Only one well may be used at one time.~~

~~(c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of construction of the well with the department on a form provided by the department. The department may return a defective notice of construction to the appropriator for correction and completion.~~

~~(d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that meets the requirements of this section.~~

~~(17) For an application for a change in appropriation right for ground water or to ground water in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or during the period of closure for any basin that is administratively closed pursuant to 85-2-319, the applicant shall comply with the provisions of [section 15] in addition to the requirements of this section."~~

Section 13. Section 85-2-506, MCA, is amended to read:

"85-2-506. Controlled ground water areas -- designation or modification. (1) The department may designate or modify controlled ground water areas as provided in this part.

(2) Designation or modification of an area of controlled ground water use may be proposed to the department on its own motion, by petition of a state or local public health agency for identified public health risks, or by petition signed by at least 20 or one-fourth of the users, ~~(~~whichever is the lesser number~~)~~, of ground water in a ground water area in which there are alleged to be facts showing that:

(a) ~~that~~ ground water withdrawals are in excess of recharge to the aquifer or aquifers within the ground water area;

(b) ~~that~~ excessive ground water withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the ground water area;

(c) ~~that~~ significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the ground water area;

(d) ~~that~~ ground water levels or pressures in the area in question are declining or have declined excessively;

(e) ~~that~~ excessive ground water withdrawals would cause contaminant migration;

(f) ~~that~~ ground water withdrawals adversely affecting ground water quality within the ground water area are occurring or are likely to occur; or

(g) ~~that~~ water quality within the ground water area is not suited for a specific beneficial use defined by ~~85-2-102(2)(a)~~ 85-2-102(4)(a).

(3) When a proposal is made, the department shall fix a time and place for a hearing, which ~~time~~ may not be less than 90 days from the making of the proposal. The place for the hearing must be within or as close as practical to the controlled ground water area.

(4) The department shall publish a notice of the hearing, setting forth:

(a) the names of the petitioners;

(b) the description by legal subdivisions (section, township, range) of all lands included in or proposed to be included in the ground water area or subarea;

(c) the purpose of the hearing; and

(d) the time and place of the hearing where any interested person may appear, either in person or by attorney, file written objections to the granting of the proposal, and be fully heard.

(5) (a) The notice of hearing must be published at least once ~~in~~ each week for 3 successive weeks not less than 30 days before the date of the hearing in a newspaper of general circulation in the county or counties in which the ground water area or subarea is located. The department shall also cause a copy of the notice, together with a copy of the petition, to be served by mail, not less than 30 days before the hearing, upon:

(i) each well driller licensed in Montana whose address is within any county in which any part of the area in question is located; ~~upon~~

(ii) each person or public agency known from an examination of the records in the department's office to be a claimant or appropriator of ground water in the area in question ~~(claimant or appropriator meaning one who diverts, impounds, or withdraws ground water and not merely one who uses or obtains ground water from another who diverts, impounds, or withdraws ground water)~~; ~~upon~~

(iii) the bureau; and ~~upon~~

(iv) the mayor or presiding officer of the governing body of each incorporated municipality located in whole or in part within the proposed ground water area.

(b) The department may also serve notice upon any other person or state or federal agency that the department feels may be interested in or affected by the proposed designation or modification of a controlled ground water area. The petition need not be served on any petitioner. A copy of the notice, together with a copy of the proposal, must be mailed to each person at the person's last-known address, and service is complete upon depositing it in the post office, postage prepaid, addressed to each person on whom it is to be served. Publication

and mailing of the notice as prescribed in this section, when completed, is considered to be sufficient notice of the hearing to all interested persons.

(c) As used in subsection (5)(a), "claimant or appropriator" means a person who diverts, impounds, or withdraws ground water and not merely a person who uses or obtains ground water from another person who diverts, impounds, or withdraws ground water."

NEW SECTION. **Section 14. Ground water appropriation right in closed basins.** (1) An application for a ground water appropriation right in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or administratively closed pursuant to 85-2-319 ~~or an application for a change in appropriation right for an appropriation right located within a closed basin pursuant to 85-2-402(17)~~ must be accompanied by a hydrogeologic assessment that has been conducted pursuant to [section ~~16~~ 15] to predict whether the proposed appropriation right ~~or change in appropriation right~~ will result in a net depletion of surface water and must be accompanied by a plan as provided in [section ~~17~~ 16], if necessary.

(2) If the hydrogeologic assessment conducted pursuant to [section ~~16~~ 15] predicts that the proposed appropriation right ~~or change in appropriation right~~ will not result in a net depletion of surface water, the department shall proceed under the criteria provided in 85-2-311.

(3) (a) ~~(i)~~ If the hydrogeologic assessment predicts that the proposed appropriation right ~~or change in appropriation right~~ will result in a net depletion of surface water, the applicant shall ~~determine if~~ ANALYZE WHETHER the net depletion results in an adverse effect on a prior appropriator. If THE APPLICANT PROVIDES ~~SUBSTANTIAL CREDIBLE INFORMATION SHOWING THAT~~ there is no adverse effect on a prior appropriator A CORRECT AND COMPLETE APPLICATION ~~and the department agrees with this determination~~, the department shall proceed TO PROCESS THE APPLICATION as provided in ~~85-2-307 through 85-2-311~~ [SECTION 17].

~~(ii) If there is THE APPLICANT FAILS TO PROVIDE SUBSTANTIAL CREDIBLE INFORMATION SHOWING THE LACK OF an adverse effect on a prior appropriator FROM NET DEPLETIONS, the department may not grant the permit unless, IN ADDITION TO ALL OTHER APPLICABLE CRITERIA, the applicant complies with subsection (4).~~

(b) If the applicant has used the water for the purpose of conducting the hydrogeologic assessment, the applicant shall terminate the use of the water. Failure to terminate use of the water must result in a fine of not more than $1,000 for each day of the violation.

(4) ~~(a)~~ If the hydrogeologic assessment predicts that there will be net depletion as provided in subsection (3)(a)~~(ii)~~, THE DEPARTMENT MAY PROCEED TO PROCESS THE APPLICATION PURSUANT TO [SECTION 17] IF, IN ADDITION

TO OTHER APPLICABLE CRITERIA, the applicant ~~may receive an appropriation right if the applicant~~ complies with [section ~~17~~ 16] ~~and the department determines that the amount of net depletion that causes~~ ~~PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT~~ ~~the adverse effect~~ ~~CAUSED BY THE NET DEPLETION~~ ~~will be offset~~.

~~(b) The department shall analyze the plan submitted pursuant to [section 17]. The department shall determine if the amount of net depletion that will result in an adverse effect will be offset. If the department determines that the amount of net depletion that will result in an adverse effect will be offset, the department shall proceed under the criteria of 85-2-307 through 85-2-311. If the amount of net depletion that the department determines will result in an adverse effect will not be offset, the department shall reject the application.~~

(5) For the purposes of [sections ~~15~~ 14 through ~~17~~ 16], the prediction of net depletion does not mean that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire amount of net depletion is the cause of the adverse effect. A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right ~~or a change in appropriation right~~ is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that ~~is claimed to~~ MAY be adversely affected.

~~(6) This section may not be interpreted to change the parameters of any water reservation as it was granted within any closed basin.~~

(6) THE PRIORITY DATE FOR AN APPROPRIATION RIGHT THAT IS GRANTED TO AN ENTITY WHOSE PERMIT APPLICATION WAS RETURNED AFTER APRIL 11, 2006, AND BEFORE [THE EFFECTIVE DATE OF THIS ACT] BECAUSE OF THE DEPARTMENT'S INTERPRETATION OF A COURT DECISION IS THE DATE OF THE INITIAL APPLICATION TO THE DEPARTMENT.

NEW SECTION. **Section 15. Hydrogeologic assessment -- definition -- minimum requirements.** (1) (a) For the purposes of [sections ~~15~~ 14 through ~~17~~ 16], "hydrogeologic assessment" means a report for the project for or through which water will be put to beneficial use, the point of diversion, ~~or~~ AND the place of use that describes the geology, hydrogeologic environment, ~~water balance,~~ water quality with regard to the provisions of [sections 18 and 19], and predicted net depletion, if any, including the timing of any NET depletion, for surface water within the area described in subsection (2)(a)(i) within the closed basins that are subject to an appropriation right, including but not limited to rivers, streams, irrigation canals, or drains that might be affected by the new appropriation right ~~or change in appropriation right~~ and any predicted water quality changes that may result.

(b) In predicting net depletion of surface water from a proposed use, consideration must be given, at a

minimum, to:

~~(i) the actual amount to be diverted according to historical practice;~~

~~(ii)~~(I) the actual amount diverted for like beneficial uses;

~~(iii)~~(II) any amounts that will likely be lost in conveyance, if any, and whether any lost amounts are lost to the system through evaporation or other means or whether those amounts are returned to the system through percolation or other means; and

~~(iv)~~(III) any return flows from the proposed use, including but not limited to any treated wastewater return flows if the treated wastewater that is considered effluent meets the requirements of [sections 18 and 19].

(2) (a) A hydrogeologic assessment that will be used to predict net depletion of surface water resulting from a new appropriation right ~~or a change in appropriation right~~ must include ~~a~~ hydrogeologic DATA OR A model developed by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer that incorporates for the new appropriation ~~or the change in appropriation right~~:

(i) the area or estimated area of ground water that will be affected not to exceed the boundaries of the drainage subdivisions established by the office of water data coordination, United States geological survey, AND USED BY THE WATER COURT, UNLESS THE APPLICANT CHOOSES TO EXPAND THE BOUNDARIES;

(ii) the geology in the area identified in subsection (2)(a)(i), including stratigraphy and structure;

(iii) the parameters of the aquifer system within the area identified in subsection (2)(a)(i) to include, at a minimum, estimates for:

(A) the lateral and vertical extent of the aquifer;

(B) whether the aquifer is confined or unconfined;

(C) the effective hydraulic conductivity of the aquifer;

(D) transmissivity and storage coefficient related to the aquifer; and

(E) the estimated flow direction or directions of ground water and the rate of movement;

(iv) the locations of surface waters within the area described in subsection (2)(a)(i) that are subject to an appropriation right, including but not limited to springs, creeks, streams, or rivers that may or may not show a net depletion;

(v) evidence of water availability; and

(vi) the locations of all wells or other sources of ground water of record within the area identified in subsection (2)(a)(i).

(b) A hydrogeologic assessment must also include a water quality report that includes:

(i) the location of existing documented hazards that could be affected or exacerbated by the appropriation right ~~or change in appropriation right~~, such as areas of subsidence, along with a plan to mitigate any conditions or impacts;

~~(ii) the chemical and physical composition of the source water or waters and any water quality impacts that may occur;~~

~~(iii)~~(II) other water quality information necessary to comply with [sections 18 and 19] ~~and to determine any cumulative water quality impacts based on the impacts of the proposed appropriation right or change in appropriation and any return flow when considered in association with projects putting water to beneficial use or discharges that have been permitted since the effective date of the basin closure~~; and

~~(iv)~~(III) a description of any water treatment method that will be used at the time of any type of injection or introduction of water to the aquifer to ensure compliance with [sections 18 and 19] and the water quality laws under Title 75, chapter 5.

(3) The hydrogeologic assessment must include an analysis of whether the information required by subsection (2) predicts~~, by a preponderance of the evidence,~~ that there may be a net depletion of surface water in the area described in subsection (2)(a)(i) and the extent of the depletion, if any.

(4) ~~(a)~~ The hydrogeologic assessment, THE model IF PROVIDED, THE test well data, THE monitoring well data, and other related information must be submitted to the department. The department shall submit this information to the bureau of mines and geology.

~~(b) The bureau of mines and geology shall examine the data and provide feedback to the department regarding the scientific adequacy of the assessment. If the bureau of mines and geology has not provided a written opinion regarding the scientific adequacy of the assessment within 90 days of receiving the information from the department, the assessment must be considered scientifically adequate and the department shall proceed with its determination.~~

~~(c)~~ The bureau of mines and geology shall ensure that information submitted pursuant to this section is entered into the ground water information center database as part of the ground water assessment program.

(5) An entity that has previously conducted some type of hydrogeologic assessment may submit the information from that assessment as the hydrogeologic assessment required by this section if the information meets the criteria and requirements of this section.

NEW SECTION. **Section 16. Aquifer recharge or mitigation plans in closed basins -- minimum**

requirements. (1) An applicant whose hydrogeologic assessment conducted pursuant to [section ~~16~~ 15] predicts that there will be a net depletion of surface water ~~that will result in an adverse effect on a prior appropriator as described in [section 15-14] may~~ SHALL offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan.

(2) ~~A mitigation plan must be approved by the department prior to approving a change in appropriation right or a new appropriation right that relies on mitigation to offset net depletion of surface water.~~ A mitigation plan must include:

(a) where and how the water in the plan will be put to beneficial use;

(b) when and where, GENERALLY, water reallocated through exchange or substitution will be required;

(c) the amount of water reallocated through exchange or substitution that is required;

(d) how the proposed project or beneficial use for which the mitigation plan is required will be operated;

(e) evidence that an application for a change in appropriation right, if necessary, has been submitted;

(f) evidence of water availability; and

(g) evidence ~~that~~ OF HOW the mitigation plan will ~~be effective in offsetting~~ OFFSET the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator.

(3) ~~An aquifer recharge plan must be approved by the department prior to approving a change in appropriation right or a new appropriation right that relies on aquifer recharge to offset net depletion of surface water.~~ An aquifer recharge plan must include:

(a) evidence that the appropriate water quality related permits have been granted pursuant to Title 75, chapter 5, and pursuant to [sections 18 and 19];

(b) where and how the water in the plan will be put to beneficial use;

(c) when and where, GENERALLY, water reallocated through exchange or substitution will be required;

(d) the amount of water reallocated through exchange or substitution that is required;

(e) how the proposed project or beneficial use for which the aquifer recharge plan is required will be operated;

(f) evidence that an application for a change in appropriation right, if necessary, has been submitted;

(g) a description of the process by which water will be reintroduced to the aquifer;

(h) evidence of water availability; and

(i) evidence ~~that~~ OF HOW the aquifer recharge plan will ~~be effective in offsetting~~ OFFSET the required amount of net depletion of surface water in a manner that will offset any adverse effect on a prior appropriator.

(4) The department may not require an applicant, through a mitigation plan or an aquifer recharge plan, to provide more water than the quantity needed to offset the ~~predicted~~ ADVERSE EFFECTS ON A PRIOR APPROPRIATOR CAUSED BY THE net depletion.

(5) An appropriation right that relies on a mitigation plan or aquifer recharge plan to offset net depletion of surface water that results in an adverse effect on a prior appropriator must be issued as a conditional permit that requires that the mitigation plan or aquifer recharge plan must be exercised when the appropriation right is exercised.

NEW SECTION. **SECTION 17. PROCESS FOR COMBINING DECISIONS ON GROUND WATER PERMIT APPLICATIONS IN CLOSED BASINS.** (1) AN APPLICANT FOR A PERMIT TO APPROPRIATE GROUND WATER IN A CLOSED BASIN SHALL SUBMIT TO THE DEPARTMENT A COMBINED APPLICATION CONSISTING OF A HYDROGEOLOGIC ASSESSMENT WITH AN ANALYSIS OF NET DEPLETION, A MITIGATION PLAN OR AQUIFER RECHARGE PLAN IF REQUIRED, AN APPLICATION FOR A BENEFICIAL WATER USE PERMIT OR PERMITS, AND AN APPLICATION FOR A CHANGE IN APPROPRIATION RIGHT OR RIGHTS IF NECESSARY.

(2) THE DEPARTMENT SHALL REVIEW THE APPLICATION TO DETERMINE IF IT IS CORRECT AND COMPLETE UNDER THE PROCESS AND REQUIREMENTS OF 85-2-302.

~~(3) (A) ONCE AN APPLICATION HAS BEEN DETERMINED TO BE CORRECT AND COMPLETE, THE DEPARTMENT SHALL ISSUE A STATEMENT OF THE DEPARTMENT'S OPINION AND THE REASONS FOR ITS OPINION, INCLUDING A CRITERIA ASSESSMENT STATING WHETHER THE DEPARTMENT IS OF THE OPINION THAT THE APPLICATION SHOULD BE APPROVED, DENIED, OR APPROVED IN A MODIFIED FORM OR UPON TERMS, CONDITIONS, OR LIMITATIONS SPECIFIED BY THE DEPARTMENT. THE CRITERIA ASSESSMENT MUST BE PROVIDED TO THE APPLICANT AND MADE AVAILABLE TO THE PUBLIC PRIOR TO PUBLIC NOTICE OF THE APPLICATION. THE DEPARTMENT SHALL PREPARE A NOTICE AND PUBLISH IT AS PROVIDED UNDER 85-2-307.~~

~~(B) IF NO VALID OBJECTION IS FILED TO THE APPLICATION AND THE CRITERIA ASSESSMENT PREPARED BY THE DEPARTMENT STATES THAT THE DEPARTMENT IS OF THE OPINION THAT THE APPLICATION SHOULD BE APPROVED, THE DEPARTMENT SHALL ISSUE THE PERMIT AND A HEARING MAY NOT BE HELD.~~

~~(C) IF NO VALID OBJECTION IS FILED TO THE APPLICATION AND THE CRITERIA ASSESSMENT PREPARED BY THE DEPARTMENT STATES THAT THE DEPARTMENT IS OF THE OPINION THAT THE APPLICATION SHOULD BE DENIED OR APPROVED IN A MODIFIED FORM OR UPON TERMS, CONDITIONS, OR LIMITATIONS SPECIFIED BY THE DEPARTMENT, THE DEPARTMENT SHALL PROCEED TO PROCESS THE APPLICATION PURSUANT TO 85-2-310(2).~~

~~(D) IF A VALID OBJECTION IS FILED TO THE APPLICATION, THE DEPARTMENT SHALL PROCEED TO PROCESS THE~~

~~APPLICATION PURSUANT TO 85-2-308 THROUGH 85-2-311. IF THE APPLICANT SATISFIES THE CRITERIA OF 85-2-311 AND 85-2-402, IF NECESSARY, AND PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT NET DEPLETION, IF ANY, WILL NOT ADVERSELY AFFECT A PRIOR APPROPRIATOR BASED ON THE APPLICANT'S MITIGATION PLAN OR AQUIFER RECHARGE PLAN, THE DEPARTMENT SHALL ISSUE THE PERMIT.~~

(3) (A) ONCE AN APPLICATION HAS BEEN DETERMINED TO BE CORRECT AND COMPLETE, THE DEPARTMENT SHALL PREPARE A NOTICE AND PUBLISH IT AS PROVIDED UNDER 85-2-307.

(B) IF NO VALID OBJECTION TO THE APPLICATION IS FILED AND THE APPLICANT PROVES THAT THE CRITERIA OF 85-2-311 OR 85-2-402, IF NECESSARY, HAVE BEEN SATISFIED, THE APPLICATION MUST BE GRANTED OR APPROVED IN A MODIFIED FORM OR UPON TERMS, CONDITIONS, OR LIMITATIONS SPECIFIED BY THE DEPARTMENT.

(C) IF NO VALID OBJECTION TO THE APPLICATION IS FILED AND THE APPLICANT HAS NOT PROVED THAT THE CRITERIA OF 85-2-311 OR 85-2-402, IF NECESSARY, HAVE BEEN SATISFIED, THE APPLICATION MUST BE DENIED.

(D) IF A VALID OBJECTION TO THE APPLICATION IS FILED, THE DEPARTMENT SHALL PROCEED TO PROCESS THE APPLICATION PURSUANT TO 85-2-308 THROUGH 85-2-311. IF THE APPLICANT SATISFIES THE CRITERIA OF 85-2-311 OR 85-2-402, IF NECESSARY, AND PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT NET DEPLETION, IF ANY, WILL NOT ADVERSELY AFFECT A PRIOR APPROPRIATOR BASED ON THE APPLICANT'S MITIGATION PLAN OR AQUIFER RECHARGE PLAN, THE DEPARTMENT SHALL ISSUE THE PERMIT.

NEW SECTION. **Section 18. Department permit coordination -- requirements for aquifer recharge plans.** TO ENSURE THAT THE DEPARTMENT AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY ARE COORDINATING THEIR RESPECTIVE PERMITTING ACTIVITIES:

(1) ~~An~~ AN applicant for a new appropriation right ~~or a change in appropriation right~~ pursuant to [section ~~15~~ 14] that involves aquifer recharge ~~or mitigation~~ shall provide the department with a copy of a relevant discharge permit if necessary~~.~~; AND

(2) ~~The~~ THE department may not grant a new appropriation right ~~or a change in appropriation right~~ pursuant to [section ~~15~~ 14] that involves aquifer recharge ~~or mitigation~~ until the discharge permit, if necessary, has been obtained and presented to the department.

NEW SECTION. **Section 19. Water quality of return flows and discharges associated with ~~mitigation plan or~~ aquifer recharge plan -- minimum requirements.** (1) A person who proposes to use sewage FROM A SYSTEM REQUIRING A WATER QUALITY PERMIT for the purposes of aquifer recharge ~~or mitigation~~ pursuant

to [section ~~17~~ 16] or plans to use sewage FROM A SYSTEM REQUIRING A WATER QUALITY PERMIT as a return flow to minimize the amount of water necessary to offset adverse effects resulting from net depletion of surface water through ~~a mitigation plan or~~ AN aquifer recharge plan pursuant to [section ~~17~~ 16] must obtain a current permit pursuant to this chapter.

(2) The minimum treatment requirements for sewage systems subject to this section are the federal requirements provided for in 40 CFR 133, and the system must meet, AT A MINIMUM, the requirements of level two treatment for the removal of nitrogen in the effluent.

(3) In addition to the minimum treatment requirements of subsection (2), sewage systems subject to this section ~~must meet the following requirements:~~

~~(a) the drinking water standards provided for in Title 75, chapter 6, at the point of discharge; and~~

~~(b) the applicable water quality standards, including the nondegradation requirements of 75-5-301 and 75-5-303 at the point of discharge~~ THAT ARE USED FOR AQUIFER INJECTION MUST MEET THE MORE STRINGENT OF EITHER PRIMARY DRINKING WATER STANDARDS PURSUANT TO TITLE 75, CHAPTER 6, OR THE NONDEGRADATION REQUIREMENTS PURSUANT TO 75-5-303 AT THE POINT OF DISCHARGE.

(4) THE APPROPRIATE INTERIM LEGISLATIVE COMMITTEE SHALL REVIEW DRINKING WATER STANDARDS AND EFFLUENT TREATMENT STANDARDS IN OTHER JURISDICTIONS AND RECOMMEND APPROPRIATE TREATMENT STANDARDS FOR PURPOSES OF AQUIFER RECHARGE AND MITIGATION.

(5) FOR THE PURPOSES OF THIS SECTION, "AQUIFER INJECTION" MEANS THE USE OF A WELL TO INJECT WATER DIRECTLY INTO AN AQUIFER SYSTEM WITHOUT FILTRATION THROUGH THE GEOLOGIC MATERIALS OVERLYING THE AQUIFER SYSTEM FOR THE PURPOSE OF AQUIFER RECHARGE OR FOR AN AQUIFER STORAGE AND RECOVERY PROJECT.

NEW SECTION. **Section 20. Aquifer storage and recovery projects in closed basins.** (1) An aquifer storage and recovery project may be authorized in a closed basin.

(2) In addition to the criteria provided in Title 85, chapter 2, part 3, AND 85-2-402, an aquifer storage and recovery project must meet the requirements provided in [sections ~~15~~ 14 through 19].

~~NEW SECTION. **Section 21. Previously approved augmentation plans.** (1) Except as provided in 85-2-337 for the Clark Fork basin, augmentation plans, mitigation plans, or aquifer recharge plans have not been specifically statutorily authorized prior to [the effective date of this act]. Any rules for augmentation plans, mitigation plans, or aquifer recharge plans that were adopted to apply to basins other than the Clark Fork basin~~

~~were adopted without express statutory authority.~~

~~(2) (a) Any appropriation right finally issued and not in administrative or judicial review in a closed basin for ground water prior to [the effective date of this act] other than in the Clark Fork basin pursuant to 85-2-337 that is contingent on or was approved based on the terms of an augmentation plan, mitigation plan, or aquifer recharge plan must meet the requirements of [sections 15 through 22] by July 1, 2008. If the requirements are not met by July 1, 2008, the permitholder shall cease operations. Failure to cease operations must result in a daily fine not to exceed $1,000 for each day of the violation.~~

~~(b) Any appropriation right that is not finally issued or that is the subject of an administrative or judicial review in a closed basin for ground water on [the effective date of this act] other than in the Clark Fork basin pursuant to 85-2-337 that is contingent on or for which approval is based on the terms of an augmentation plan, mitigation plan, or aquifer recharge plan must meet the requirements of [sections 15 through 22].~~

~~(3) The holder of an appropriation right described in subsection (2) shall submit proof of meeting the requirements to the department for the department's approval.~~

~~(4) Once a new appropriation right or change in appropriation right that is subject to subsection (1) or (2) complies with the requirements of [sections 15 through 22], the priority date for a new appropriation right subject to this section is the date of the initial application to the department.~~

NEW SECTION. **Section 21. Aquifer testing, test well, or monitoring well data submission -- not beneficial use.** (1) All aquifer testing data and other related information from test wells, monitoring wells, or other sources that is collected for the purpose of obtaining a new appropriation right or a change in appropriation right pursuant to [sections ~~15~~ 14 through ~~17~~ 16] must be submitted to the department and the bureau of mines and geology in a form prescribed by the department and the bureau of mines and geology. The bureau of mines and geology shall ensure that information submitted pursuant to this section is entered into the ground water information center database as part of the ground water assessment program.

(2) (a) Water testing or monitoring is not a beneficial use of water requiring the filing of a permit application.

(b) A permit is not required if the intent of a person is to conduct aquifer tests, water quality tests, water level monitoring, or other testing or monitoring of a water source.

NEW SECTION. **Section 22. Rulemaking.** The department may adopt rules to implement the

provisions of [sections ~~15~~ 14 through 18 ~~and 20 through 22~~, 19, AND 20]. The rules must be oriented toward the protection of existing rights from adverse effects from net depletions caused by new appropriation rights or changes in appropriation rights in closed basins and must be consistent with and not exceed the requirements of [sections ~~15~~ 14 through 18 ~~and 20 through 22~~, 19, AND 20].

NEW SECTION. **Section 23. Closed basin case study.** (1) (a) The Montana bureau of mines and geology, provided for in 20-25-211, shall review, assess for scientific accuracy, and compile and summarize ground water studies that have been conducted in the last 20 years in closed basins or subbasins in Montana that may have a bearing on better understanding the water balance in these basins with respect to potential ground water withdrawal impacts on surface water. The bureau of mines and geology shall also study the extent to which ground water withdrawals may result in net depletion of surface water in a closed basin or in specific areas of a closed basin.

(b) After compilation of the information, the bureau of mines and geology shall present recommendations to the appropriate legislative interim committee regarding any additional studies that would help to assess the water balance in closed basins or subbasins with respect to potential ground water withdrawal impacts on surface waters.

(2) The bureau of mines and geology shall conduct a case study to gather and develop data to determine the adequacy of any additional recommended minimum standards and criteria for hydrogeologic assessments, as defined in [section ~~16~~ 15], associated with ground water withdrawals and the range of impacts of those withdrawals on surface water and ground water resources. The department of natural resources and conservation shall coordinate with the bureau of mines and geology with regard to surface water monitoring and other elements of the case study as necessary.

(3) The case study must be conducted in basins closed pursuant to sections 85-2-330, ~~85-2-337~~ 85-2-336, 85-2-341, 85-2-343, or 85-2-344. The bureau of mines and geology shall ensure that at each site involved in the case study the following, at a minimum, is accomplished to provide the necessary scientific data and information to policymakers:

(a) an appropriate number of monitoring wells are drilled or available to provide scientifically defensible data;

(b) aquifer testing and recovery testing is conducted at the site;

(c) water quality samples are collected from each pumping or primary well at the beginning of the case

study and at the end of the case study;

(d) if information or data has already been collected for the site, the information is reviewed, analyzed, and verified by the bureau of mines and geology;

(e) if the site has an established system, that the established system is monitored under its current or planned operating conditions; and

(f) any other information is collected that the bureau of mines and geology determines is necessary to determine recommendations for additional minimum standards and criteria for hydrogeologic assessments, as defined in [section ~~16~~ 15], associated with ground water withdrawals and the range of impacts those withdrawals have on surface water and ground water resources.

(4) In addition to the requirements of subsection (3), the bureau of mines and geology shall develop a system to compile existing aquifer testing data, as well as data resulting from hydrogeologic assessments, as defined in [section ~~16~~ 15], and monitoring activities.

(5) The department of natural resources and conservation shall coordinate with the bureau of mines and geology to provide surface water measurements ~~to determine impacts, if any, to surface water resources~~, AS APPROPRIATE, when a well located at a case study site is pumped.

(6) The bureau of mines and geology shall:

(a) provide updates to the appropriate legislative interim committee throughout the interim related to the progress of the review pursuant to subsection (1) and the case study pursuant to subsections (2) through (5), data trends, if any, and other information necessary to assist the legislative interim committee in developing any necessary policy recommendations;

(b) upon request, provide updates to the ground water assessment steering committee provided for in 2-15-1523; and

(c) submit a report to the appropriate legislative interim committee and the 61st legislature providing a detailed analysis of the results of the review and case study.

NEW SECTION. **Section 24. Case study -- requirements for participation -- FEE.** (1) (a) Participants in the case study that are proposing a new ground water appropriation ~~or a change in appropriation right pursuant to 85-2-402(17)~~ are subject to the requirements of [sections ~~15~~ 14 through ~~22~~ 21].

(b) Up to a maximum of 10 sites that are the result of a new appropriation or a change in appropriation right may be included in the case study provided for in [section ~~24~~ 23]. If there are more than 10 entities wishing

to participate in the case study, the bureau of mines and geology shall select participants to ensure that to the extent possible each closed basin is represented and as many different scenarios are represented as necessary to ensure a scientifically accurate analysis.

(c) If there are fewer than 10 entities wishing to participate or if there is a scenario that is not represented by case study participants that is necessary to ensure a scientifically accurate analysis, the bureau of mines and geology may request cooperation and participation from entities that hold appropriation rights for wells within closed basins.

(d) Entities that had an application pending with the department of natural resources and conservation on April 11, 2006, must be given the option to participate in the case study before the bureau accepts other requests for participation.

(2) The bureau of mines and geology, in cooperation with the appropriate legislative interim committee, shall notify each of the entities described in subsection (1)(d), in writing, of the opportunity to participate in the case study and the requirements for participation.

(3) To participate in the case study, a participant shall agree:

(a) that the use of a ground water well in accordance with an application submitted pursuant to [section ~~15~~ 14] does not grant or give the participant an appropriation right;

(b) to allow the installation of monitoring wells and shall allow access for monitoring and review purposes;

(c) if monitoring or test wells exist at the site, to allow the bureau of mines and geology access to those wells for monitoring and review purposes;

(d) to allow for the measurement of pumping at the primary pumping well, including any plumbing requirements necessary to ensure an accurate analysis of pumping records and of the impacts, if any, resulting from pumping of the well; ~~and~~

(e) that the participant is responsible for costs associated with drilling the primary pumping well, maintenance associated with the well, and other costs reasonably related to the normal operation of a pumping well in the absence of the case study; AND

(F) TO PAY A FEE OF $15.

~~NEW SECTION. **Section 26. Recognition of existing appropriation rights.** Except as provided in [section 21], an appropriation right in a closed basin prior to April 11, 2006, that was finally issued and that is not~~

~~subject to any administrative or judicial action is recognized and confirmed.~~

NEW SECTION. **Section 25. Appropriation.** There is appropriated FROM THE GENERAL FUND $500,000 to the Montana bureau of mines and geology ONLY for the biennium beginning July 1, 2007, for the purpose of conducting a case study in coordination with the department of natural resources and conservation to gather and develop data to determine minimum standards and criteria for hydrogeologic assessments, as defined in [section ~~16~~ 15], associated with ground water withdrawals and the impacts of those withdrawals on surface water and ground water resources.

NEW SECTION. **Section 26. Direction for amendment of rule.** Pursuant to 2-4-412(2), the department shall:

(1) amend ARM 36.12.101 by striking subsection (8); and

(2) amend ARM 36.12.120 by striking subsections (6) through (10).

NEW SECTION. **SECTION 27. REPEALER.** SECTION 85-2-337, MCA, IS REPEALED.

NEW SECTION. **Section 28. Codification instruction.** (1) [Sections ~~15~~ 14 through 18 and 20 through ~~23~~ 22] are intended to be codified as an integral part of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, part 3, apply to [sections ~~15~~ 14 through 18 and 20 through ~~23~~ 22].

(2) [Section 19] is intended to be codified as an integral part of Title 75, chapter 5, part 4, and the provisions of Title 75, chapter 5, part 4, apply to [section 19].

NEW SECTION. **Section 29. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 30. Effective date.** [This act] is effective on passage and approval.

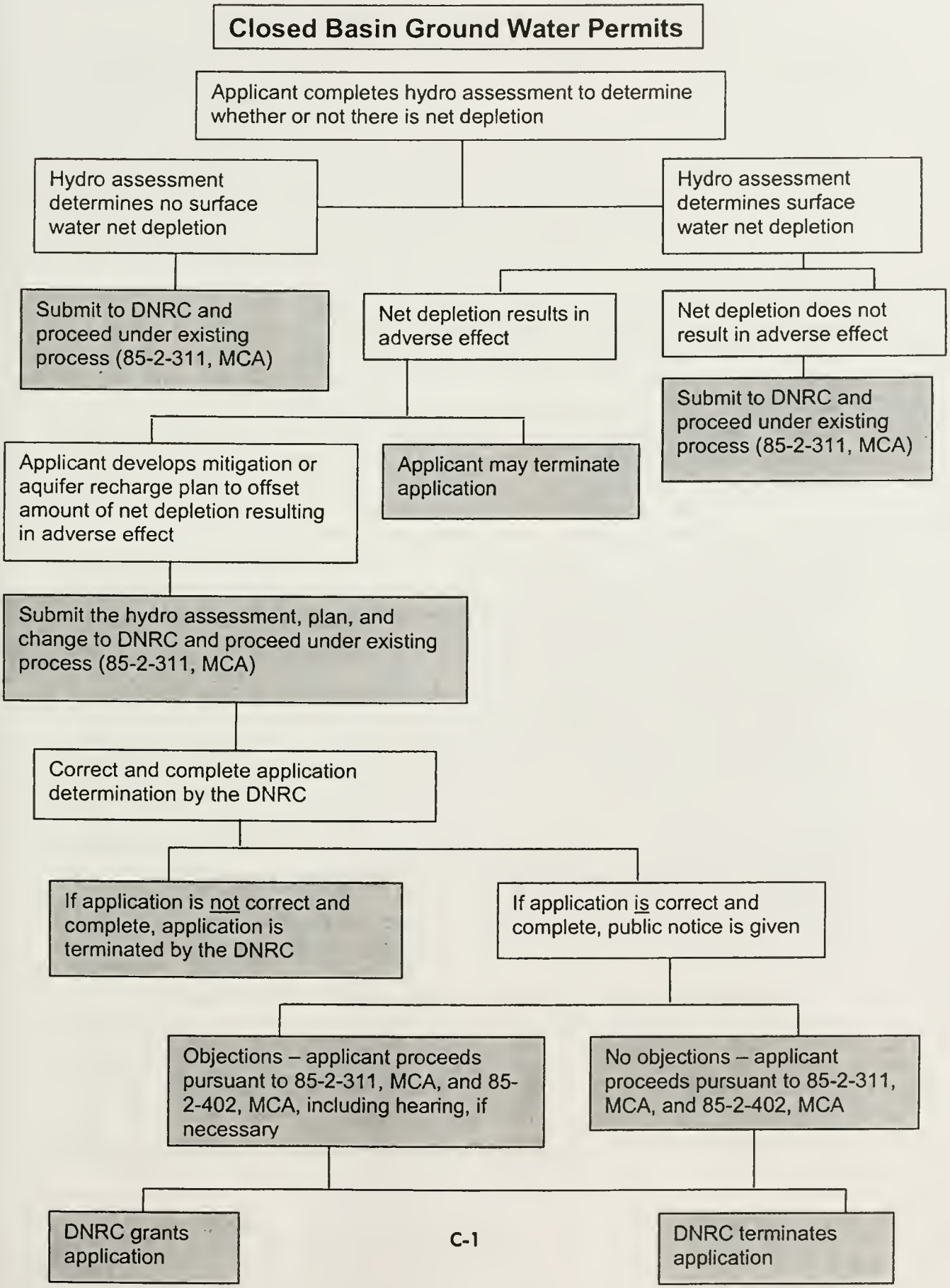
NEW SECTION. **Section 31. Applicability ~~-- retroactive applicability~~.** ~~(1) [Sections 1 through 20 and 22 through 26] apply~~ [THIS ACT] APPLIES to applications for an appropriation right ~~or change in appropriation right~~

in a closed basin ~~pending or~~ filed on or after [the effective date of this act] ~~or that are in administrative or judicial proceedings on [the effective date of this act]~~.

~~(2) [Section 21] applies retroactively, within the meaning of 1-2-109, to augmentation plans, mitigation plans, or aquifer recharge plans in closed basins, other than the Clark Fork River basin, that have not been specifically statutorily authorized prior to [the effective date of this act].~~

- END -

Appendix C


Closed Basin Ground Water Permits
Applicant completes hydro assessment to determine whether or not there is net depletion
Hydro assessment determines no surface water net depletion
Hydro assessment determines surface water net depletion
Submit to DNRC and proceed under existing process (85-2-311, MCA)
Net depletion results in adverse effect
Net depletion does not result in adverse effect
Submit to DNRC and proceed under existing process (85-2-311, MCA)
Applicant develops mitigation or aquifer recharge plan to offset amount of net depletion resulting in adverse effect
Applicant may terminate application
Submit the hydro assessment, plan, and change to DNRC and proceed under existing process (85-2-311, MCA)
Correct and complete application determination by the DNRC
If application is not correct and complete, application is terminated by the DNRC
If application is correct and complete, public notice is given
Objections – applicant proceeds pursuant to 85-2-311, MCA, and 85-2-402, MCA, including hearing, if necessary
No objections – applicant proceeds pursuant to 85-2-311, MCA, and 85-2-402, MCA
DNRC grants application
DNRC terminates application

WHO HAS JURISDICTION OVER MONTANA'S WATER?

The Montana Water Court has exclusive jurisdiction over the final determination of "existing water rights" (i.e. water right claims with Pre-July 1, 1973, priority dates). See § 85-2-215, MCA.

The DNRC has exclusive jurisdiction over post-July 1, 1973, water right permits and change applications. See §§ 85-2-302 and -402, MCA.

The District Courts have jurisdiction over water distribution controversies and "may grant injunctive or other relief necessary and appropriate to preserve property rights or the status quo pending issuance of the final decree." The District Court also has jurisdiction over ditch easement conflicts. See § 70-17-112, MCA.

WHAT ARE YOUR OPTIONS IF YOU GET INTO A CONTROVERSY OVER WATER?

1. First talk with the person about the problem. If you can work it out among yourselves this is obviously the best solution. If talking doesn't work, there are other options available; depending on what is the source of the problem.

2. You can file a court action in the appropriate District Court asking for a temporary restraining order and preliminary injunction. See §§ 27-19-101, 201, and 314, MCA. This will probably be the fastest way to obtain relief, but it is also the most expensive, as for most water users it will require the hiring of an attorney. This option is very formal and often polarizes the parties after one party "wins."

3. If a person is wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use the water, or violating a provision of the Montana Water Use Act, then call the DNRC regional office in your area and they can assist you in filing a report in accordance with § 85-2-114, MCA.

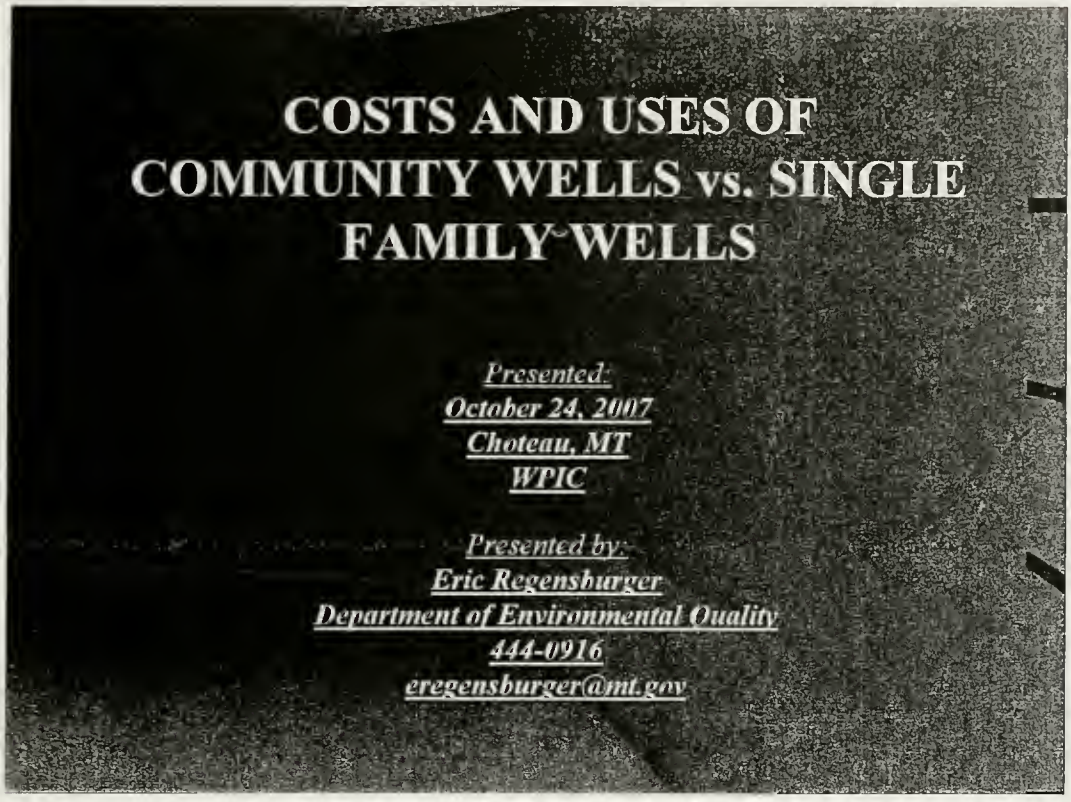
4. A fourth option, available only to water users who claim water rights previously decreed by a District Court, is to file a petition with the District Court to have a water commissioner appointed to distribute the water. See § 85-5-101, MCA. If a water user on a previously decreed stream is dissatisfied with the method of distribution by the water commissioner, then that water user can file a written and verified complaint with the District Court and request a hearing on the matter. See § 85-5-301, MCA.

5. A fifth option is to file a petition with the District Court under § 85-5-110, MCA, to seek the appointment of a water mediator to mediate the water controversy.

6. A sixth option is to file a petition with the District Court pursuant to § 85-2-406, MCA, and request the District Court to certify the determination of the disputed existing rights involved in the controversy to the Chief Water Judge. This would likely involve water rights or streams that have not been involved in a prior District Court decree.

7. A seventh option available to water users in a basin that is subject to a Water Court issued Temporary Preliminary or Preliminary Decree, as modified after objections and hearings, is to petition the District Court to enforce the provisions of the modified water court decree in accordance with §§ 3-7-212, 85-2-231, 85-2-406 or 85-5-101, MCA.

Source: Excerpt from Montana Water Court Guidebook


COSTS AND USES OF COMMUNITY WELLS vs. SINGLE FAMILY WELLS
Presented:
October 24, 2007
Choteau, MT
WPIC
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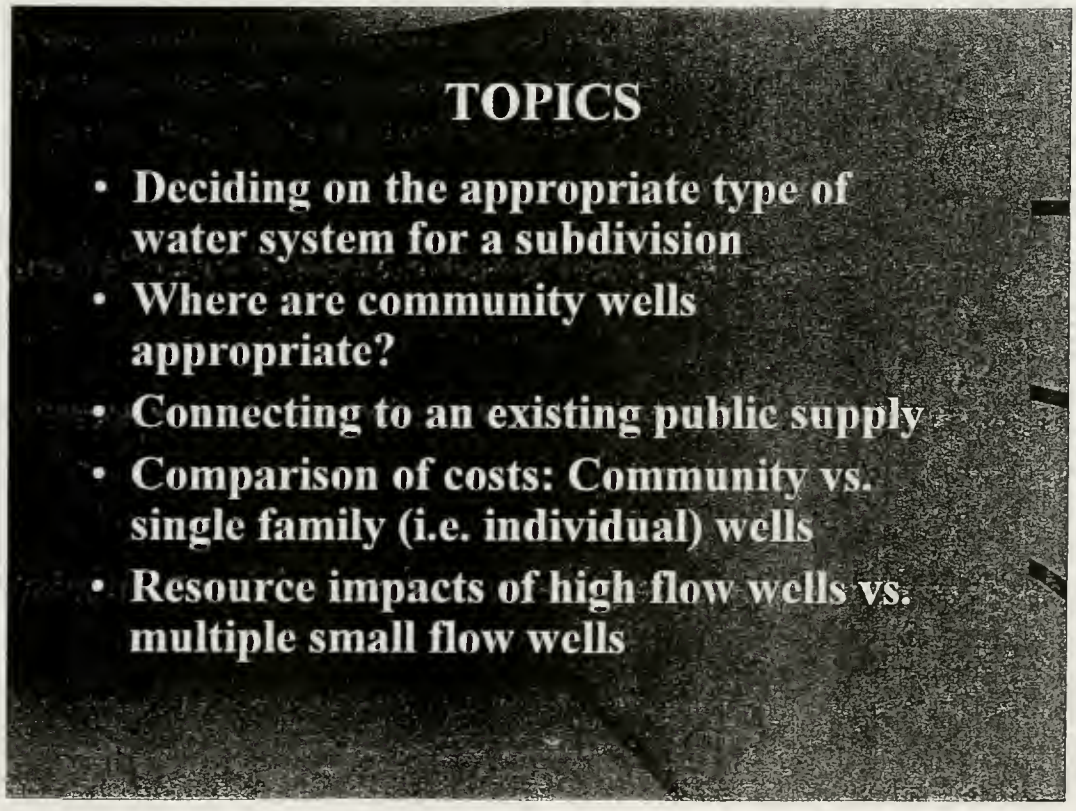

TOPICS
• Deciding on the appropriate type of water system for a subdivision
• Where are community wells appropriate?
• Connecting to an existing public supply
• Comparison of costs: Community vs. single family (i.e. individual) wells
• Resource impacts of high flow wells vs. multiple small flow wells

DEFINITION

- PUBLIC WATER SYSTEM
  - Serves 25 or more people or 15 or more connections for 60 days or more per year.
  - Community (e.g. town)
  - Non-transient, non-community (e.g. school)
  - Transient, non-community (e.g. restaurant)
- MULTI-USER WATER SYSTEM
  - 3 through 14 living units or commercial structures, total population cannot exceed 24
- Community = multi-user/public system (for purposes of this discussion)

WHAT IS THE APPROPRIATE WATER SYSTEM

- For lots 1 acre and larger:
  - Decision is up to the developer
  - Must meet DEQ rules and circulars
  - DEQ cannot dictate type of water system if rules are met
- For lots over 20,000 sq. feet and under 1 acre:
  - must have either community water or wastewater
- For lots 20,000 sq. feet (approx ½ acre) or less:
  - Must have both community water and wastewater

WHERE ARE COMMUNITY WELLS APPROPRIATE?

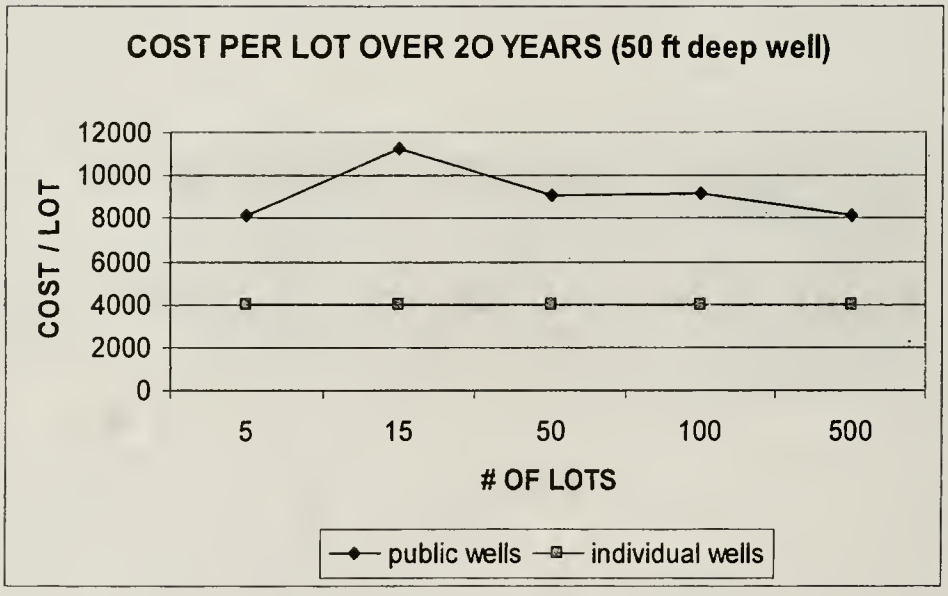
- Community wells can be used on just about any subdivision, but:
  - With larger lots, infrastructure becomes more expensive and complicated
  - Aquifer can be limiting factor (low yield wells)
  - Slow build-out of subdivision can result in water quality issues due to dead ends and stagnant water
  - Can developer afford up-front costs

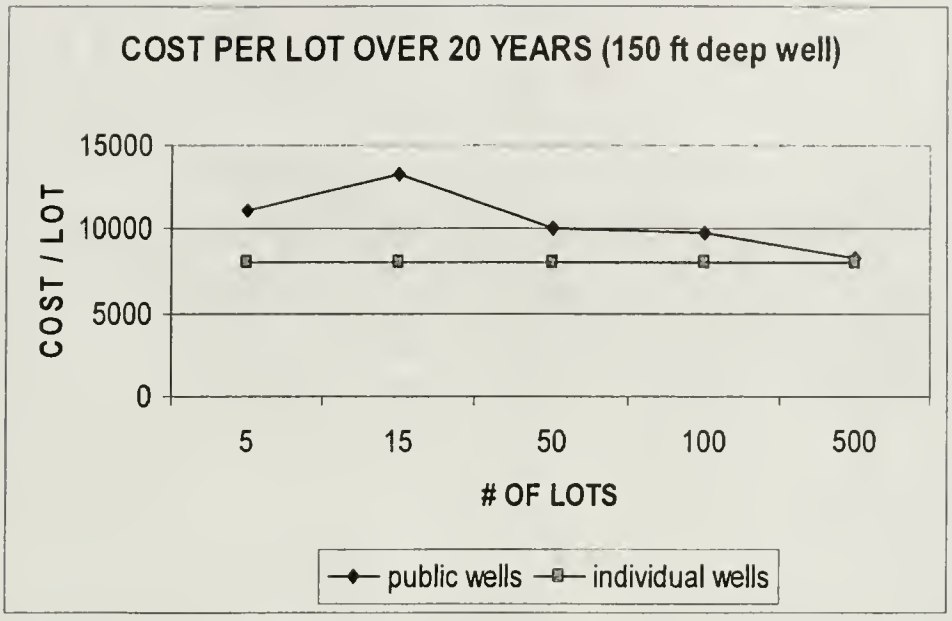
CONNECTION TO AN EXISTING PUBLIC WATER SUPPLY

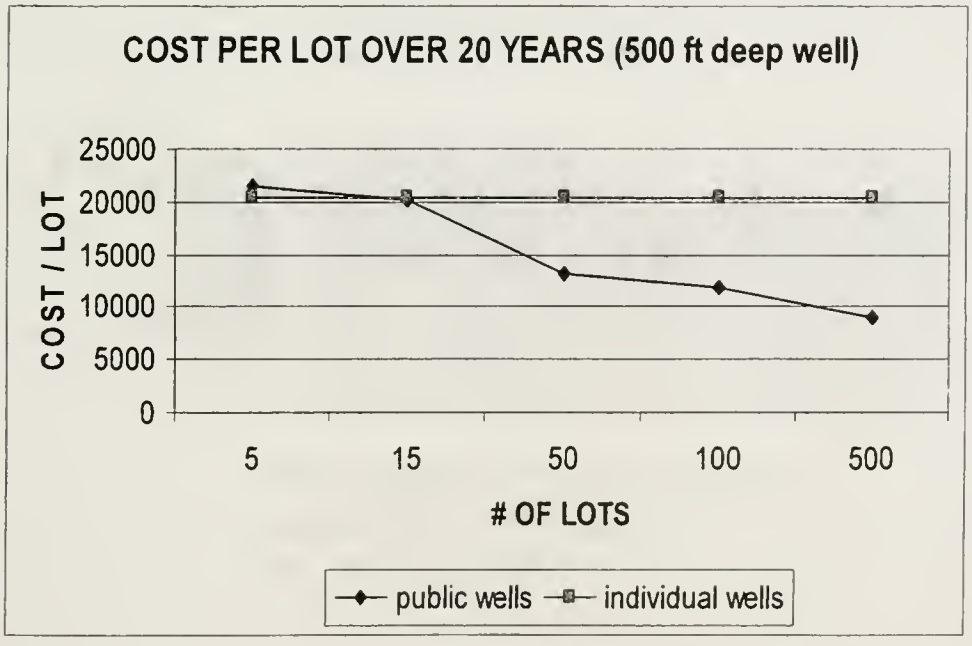
- Rules require connection to existing public system within 500 feet of a proposed subdivision, unless:
  - The cost to connect is >3x the cost as compared to an approvable on-site system;
  - Connection is limited by a physical obstruction;
  - Connection is limited by unobtainable easement; or
  - Public system wont allow connection
  - Doesn't apply to existing multi-user system
- Cost to design and build water connection is initially borne by developer
  - Up-front costs incorporated into lot prices

COSTS OF COMMUNITY vs INDIVIDUAL WELLS

			MUTLI_FAMILY / PUBLIC WATER SYSTEM										
Well Depth (feet)	# LOTS	# Wells	Drill + Pump ($150/ft)[1]	Infrastructure[2]	Monitoring + Operator (year)[3]	Total	Total (20 years)	Cost / Lot (20 Years)	# Wells	Drill + Pump ($30/ft)[4]	Monitoring + Operator	Total	Cost / Lot (20 years)
50	5	1	$7,500	$33,000	$0	$40,500	$40,500	$8,100	5	$20,000	$0	$20,000	$4,000
50	15	2	$15,000	$84,000	$3,500	$102,500	$169,000	$11,267	15	$60,000	$0	$60,000	$4,000
50	50	3	$22,500	$362,500	$3,500	$388,500	$455,000	$9,100	50	$200,000	$0	$200,000	$4,000
50	100	4	$30,000	$815,000	$3,500	$848,500	$915,000	$9,150	100	$400,000	$0	$400,000	$4,000
50	500	6	$45,000	$3,925,000	$3,500	$3,973,500	$4,040,000	$8,080	500	$2,000,000	$0	$2,000,000	$4,000
150	5	1	$22,500	$33,000	$0	$55,500	$55,500	$11,100	5	$40,000	$0	$40,000	$8,000
150	15	2	$45,000	$84,000	$3,500	$132,500	$199,000	$13,267	15	$120,000	$0	$120,000	$8,000
150	50	3	$67,500	$362,500	$3,500	$433,500	$500,000	$10,000	50	$400,000	$0	$400,000	$8,000
150	100	4	$90,000	$815,000	$3,500	$908,500	$975,000	$9,750	100	$800,000	$0	$800,000	$8,000
150	500	6	$135,000	$3,925,000	$3,500	$4,063,500	$4,130,000	$8,260	500	$4,000,000	$0	$4,000,000	$8,000
500	5	1	$75,000	$33,000	$0	$108,000	$108,000	$21,600	5	$102,500	$0	$102,500	$20,500
500	15	2	$150,000	$84,000	$3,500	$237,500	$304,000	$20,267	15	$307,500	$0	$307,500	$20,500
500	50	3	$225,000	$362,500	$3,500	$591,000	$657,500	$13,150	50	$1,025,000	$0	$1,025,000	$20,500
500	100	4	$300,000	$815,000	$3,500	$1,118,500	$1,185,000	$11,850	100	$2,050,000	$0	$2,050,000	$20,500
500	500	6	$450,000	$3,925,000	$3,500	$4,378,500	$4,445,000	$8,890	500	$10,250,000	$0	$10,250,000	$20,500




COST PER LOT OVER 20 YEARS (150 ft deep well)
15000
10000
5000
0
COST / LOT
5
15
50
100
500
OF LOTS
public wells
individual wells


COST PER LOT OVER 20 YEARS (500 ft deep well)
25000
20000
15000
10000
5000
0
COST / LOT
5
15
50
100
500
OF LOTS
public wells
individual wells

IMPACTS OF HIGH FLOW WELLS vs MULTIPLE LOW FLOW WELLS

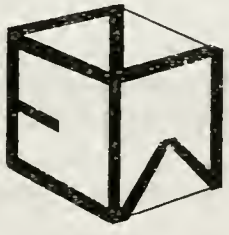
- Amount of water use per home in community system could be reduced due to per gallon cost of water
- Distribution/location of wells can effect impacts to nearby resources (e.g. surface water)
- Using community wells often means higher density than with individual wells

Presentation
to
Water Policy Interim Committee

January 15, 2008

Update on Evaluations Significance of Exempt Wells Montana's Closed Basins

prepared by



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Update on Evaluations Significance of Exempt Wells
Montana's Closed Basins

by

Michael E. Nicklin, PhD, PE

The focus of my presentation today is to expand on the relative significance of exempt wells on stream flows from a water supply perspective. My first efforts on this issue were first defined in a study I completed in early 2007 (Nicklin Earth & Water, Inc., 2007). This presentation also uses information and interpretations that were developed by the Montana Department of Natural Resources and Conservation (DNRC) as set forth in its "Working Draft Memorandum entitled Effects of Exempt Wells on Existing Water Rights" [DNRC Memorandum]. The information presented in the DNRC Memorandum, if put in a proper perspective, actually further buttresses the conclusions that I had drawn in the Gallatin Valley study.

The original Gallatin Valley study was employed to develop a better understanding of the relative significance of ground-water extractions as they affect stream flows and also on ground-water levels. In that study, I used standard hydrologic evaluation methodology to conclude that the relative significance of exempt wells is inconsequential (de Minimus) in comparison to stream flows and irrigation demands on those stream flows. Although flow changes and below average flow in the streams of the Gallatin Valley have been observed in recent years, these changes are obviously due to climatic factors (drought).

Since the original effort, Nicklin Earth & Water, Inc. (NE&W) has conducted more detailed assessments including the following:

- Considering projected population growth using demographic projections by the Census Bureau and other means.
- Conducting preliminary ground-water model simulation efforts using a regional model that I have developed for the Gallatin Valley.
- Evaluating agricultural irrigation usage and agricultural commodity production over time in the Gallatin Valley.
- Analyzing drought implications/conditions on stream flows of the Gallatin Valley.

The focus of these efforts was to expand our previous work regarding concerns expressed by DNRC and others that the growth in the number of exempt wells will cause adverse impacts of existing water users (senior appropriators) in the valley. My preliminary assessment using the updated information leads to conclusions that are in conformance with conclusions set forth in the initial Gallatin Valley study. I also conclude that the potential for adverse impacts to existing appropriators (senior or junior) from the growth of exempt wells is highly unlikely to be a factor as far as one can

meaningfully project population growth in the future.

Some Observations and Commentary on DNRC Memorandum

Observation/Comment #1

Most of the exempt wells in the valley have tended to be clustered in the valley in areas that were historically irrigated with surface water. There are obviously some areas where exempt wells have been placed where land had not been historically irrigated. The key to properly evaluating the potential for adverse impacts in a study area is to conduct a thorough water budgeting effort. This includes addressing all the depletions (e.g., well pumping, stream diversions, etc.) and all accretions (recharge, runoff, etc.). This should be done before drawing conclusions and prior to developing water policies that may or may not be appropriate.

Observation/Comment #2

In the Gallatin Valley, the majority of exempt wells are located at significant distances from both the West Gallatin River or the East Gallatin River. The relative distance of a well from a stream is very important in quantifying the influence of a pumping well on a given stream. For example, if a given well is close and also hydraulically connected to a stream, pumping during the summer manifests its affects on flow more substantially during the irrigation season and less during the non-irrigation season. However, as the distance between a pumping well and stream increases, the interaction becomes more uniform or steady with time. The technical reasons for this are presented in a recent article in the publication Ground Water (Bredehoeft and Kendy, 2008).

In effect, pumping of a single exempt well substantially distant from a river will result in the consumed water being spread throughout the calendar year at a relatively steady rate. Hence, a well consumptively using 0.33 acre-ft of irrigation water during the irrigation season will result in about 0.14 acre-ft of water being abstracted from the stream during the irrigation season (May 1 through September 30) if the flow impacts are steady-state. In essence, an assertion that 0.34 acre-ft of water from a given well pumping in the Gallatin Valley would have been available for senior or junior surface water appropriators during the irrigation season is false.

For the Gallatin Valley, a ground-water model that I have developed addresses the distribution of the wells in the valley and aquifer system parameters. Preliminary simulations results from that effort reveal that it is appropriate to assume that a steady-state assumption for exempt well consumption effects on stream flow is a reasonable approximation in the valley. However, even this assumption probably yields results that are overly conservative simply because there are other water budget factors that need to be addressed as well.

In effect, it is inaccurate to characterize or extrapolate that the total seasonal consumptive use of irrigation water from exempt wells would have been available for surface water users during the season of irrigation.

Observation/Comment #3

In its Work Draft Memorandum, DNRC projects the potential growth of exempt wells to year 2060. Making projections of population growth and well development this far into the future is, at the very least, highly speculative. For purposes of the evaluation that follows, I will constrain the discussion to computations set forth by DNRC to the year ending 2030.

Let us examine the following statement by the DNRC:

> Depletions by exempt well use may not be discernible by basin-scale water balances or analysis of hydrographs of gross basin inflows and outflows, in part because these depletions are small relative to annual flows. In addition, records of consumption by exempt well use may be masked during periods of water shortage by curtailment of junior surface water uses.

The key word here is "may" be masked. Again, this is purely speculation on the part of DNRC as it has no definitive evidence to prove this.

In order to put DNRC's claims in another perspective I have done the following:

1) Quantified the existing number of domestic wells in the Gallatin Valley using the Montana Bureau of Mines and Geology Ground-water Information Center database. It should be noted that this database seems to provide current well number estimates that exceed the exempt well computations set forth in the DNRC memorandum.

2) Developed projected well exemption growth estimates based upon current well growth patterns and population growth estimates presented defined by the Census Bureau.

3) Utilized the relative consumptive use estimates provided by the DNRC in its memorandum.

4) Compared the increased demands using Gallatin River flow data cited in the DNRC memorandum.

5) Assessed the likelihood or lack thereof that surface water irrigators in the valley could be adversely impacted with the increase in exempt wells (from present to 2030).

6) Provided a visual perspective of the significance of the projected increase in consumptive developed DNRC with exempt well growth using graphical procedures.

Figure 1 provides a location map.

Figure 2 provides a plot showing current well growth trends (most wells are domestic - exempt). This plot provides two projections, the upper plot uses current well growth trends, the lower plot uses census-based projections.

Using DNRC consumptive values and MBMG GWIC data, the maximum impact on surface water flows as it affects irrigators during the irrigation season associated with projected exempt well growth in the Gallatin Valley by year 2030 is projected to be 1.69 cfs (68 miners inches).

Figures 3 - 7 provide self-explanatory plots using an overly simplistic assumption that the net water balance is limited to stream flows and well pumping. Again, there are obviously other water budget issues as well which further mitigate the significance of exempt wells.

All the plots show that the influence of exempt wells is de Minimus. Even if we discount other water budget factors, 68 miners inches, is not a very substantial amount of surface water for irrigation use, especially if that flow is spread throughout the valley. This 68 miners inches of flow would not be concentrated to the I-15 bridge on the West Gallatin as seems to be inferred by DNRC. This affect of the abstraction would be distributed throughout the valley (East Gallatin, West Gallatin, Gallatin, Sourdough Creek, etc.). Furthermore, there are other water budget factors at stake as well which should be accounted for including: contributions to surface water and ground-water recharge associated with runoff from impervious surfaces; reduction in plant transpiration associated with presence of impervious surfaces; reduced surface water irrigation; etc.. These factors are not accounted for in DNRC methods.

Hence, it is concluded DNRC's claim of "masking" has no basis.

In a nutshell, definitive adverse impacts from exempt wells to prior appropriators is difficult to reconcile when the facts and data are properly accounted for in the Gallatin Valley.

Additional Comparisons

The DNRC also projects/claims that there "may" be an increase of about 10,000 acre-ft of consumptive use in association with exempt wells by the year 2030 in Montana closed basins. It even goes so far as to speculate to the amount of exempt well water use by

the year 2060. This cannot be meaningfully done.

Let us put this DNRC projection of 10,000 acre-ft additional use by the year 2030 in perspective as follows:

- Not all the 10,000 acre-ft of water would have been available for irrigation use during the irrigation season simply because abstractions from exempt well pumping are spread throughout the year. If other watersheds/well conditions are reasonably comparable to those of the Gallatin Valley, this would leave about 5,000 acre-ft (as opposed to 10,000 acre-ft) of water feasibly available for the irrigation season (assumes methods defined by Bredehoeft and Kendy, 2008 are appropriate).

- The 5,000 acre-ft of "impact" to senior appropriators is spread over the entire area of all the closed basins in Montana. Furthermore, this 5,000 acre-ft would be distributed between numerous if not several hundred different streams within these closed basins.

- From an irrigator's perspective this is equivalent to dividing about 552 miners inches of flow between all the streams in the closed basins of Montana which has an area of about 23,900 square miles. The net significance on a stream by stream basis is inconsequential when considered on a practical basis. As an illustration of this point, 5,000 acre-ft of consumption equates to approximately 3,500 acre-ft of alfalfa irrigation for this entire region (see Figure 8). Again, this is a worst case scenario simply because DNRC does not take into account other water budget factors which are indeed relevant.

- Again, using DNRC's own projections, I conclude that any consequences on stream flow associated with exempt wells are de Minimus.

Summary

In summary, it is my conclusion that when the overall projected effects of exempt wells are properly accounted for using water budget methods that everyone in the profession of hydrology should employ, it is difficult to conceive that there would be any practical circumstance in any closed basin in Montana where future growth in exempt wells would result in any discernable, detectable, or measurable adverse impact to any prior surface water appropriator. If any such circumstance does exist it would be anomalous. It would be highly questionable to establish water policy for the entire state of Montana on the basis of an anomalous condition.

In my review of work products that have been prepared by the Montana Bureau of Mines and Geology from their efforts involving the North Helena Valley (Madison 2006), the Bitterroot River Basin, and in their evaluations of well hydrographs statewide, it is clear that my interpretative results are by no means unique.

References

Bredehoeft J., and E. Kendy. Strategies for Offsetting Seasonal Impacts of Pumping on a Nearby Stream. Ground Water. Volume 46, No. 1. 2008.

Madison, J. Hydrology of the North Hills, Helena, MT. Montana Bureau of Mines and Geology Open-File Report 544. 2006.

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Montana Department of Commerce Community Development Division. Montana's Growth Policy Resource Book Montana. 2007.

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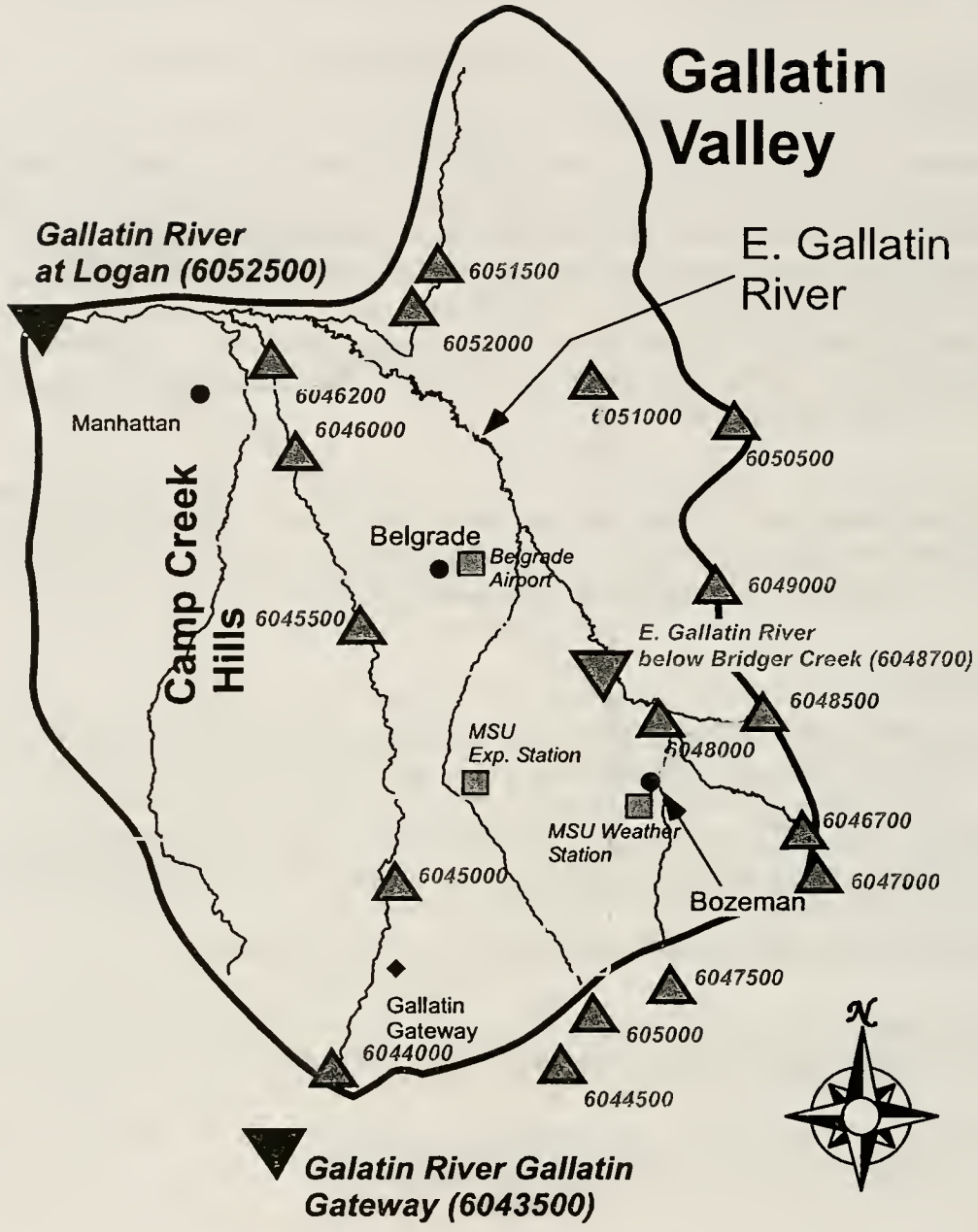

Figure 1 - Measurement Stations Gallatin Valley

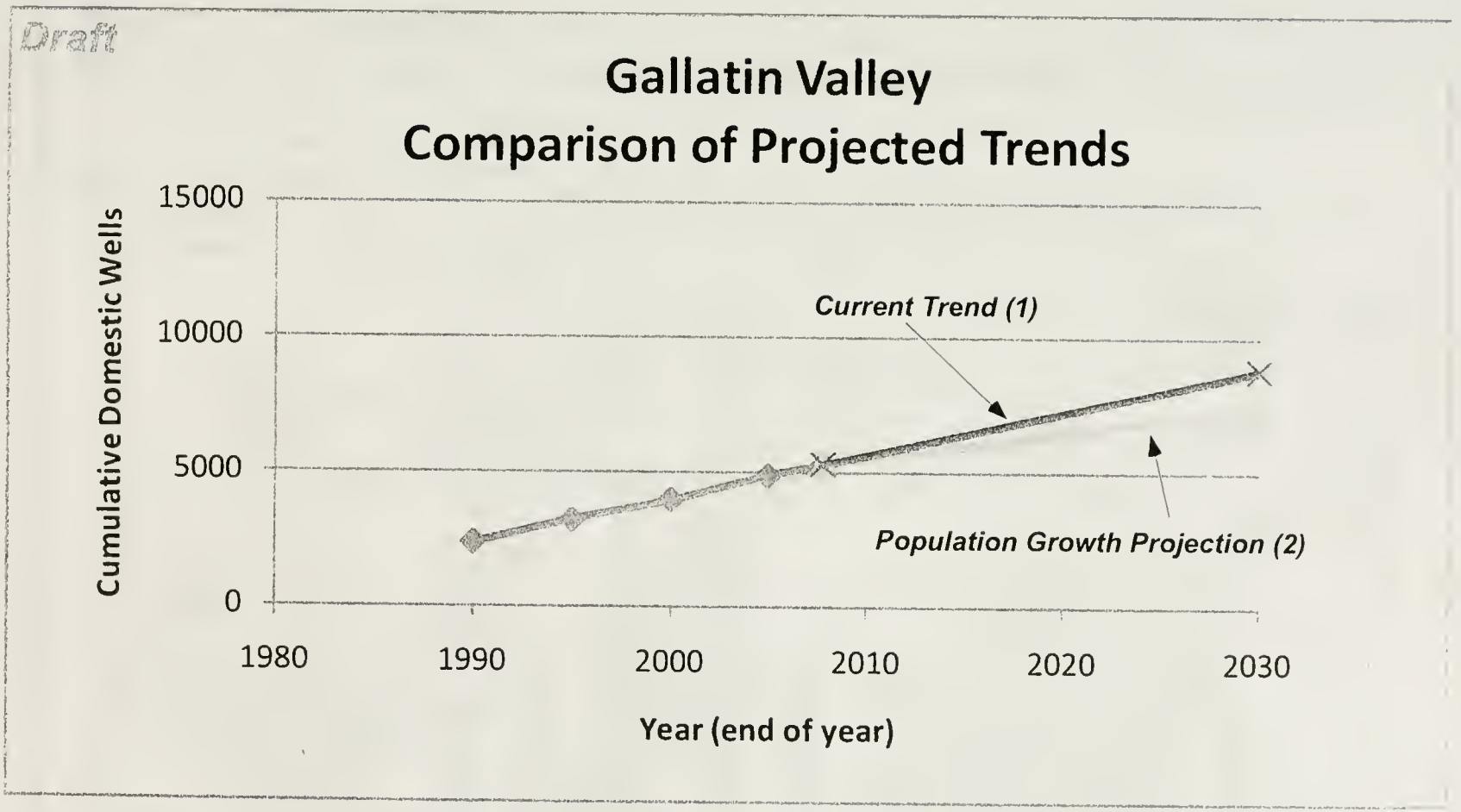

Figure 2 - Domestic well addition trends and population growth projections for Gallatin Valley.

1) *Based upon Montana Bureau of Mines and Geology GWIC data (through 2007)*

2) *Projections made based upon "Montana's Growth Policy Resource Book - Montana Department of Commerce Community Development Division January, 2007."*

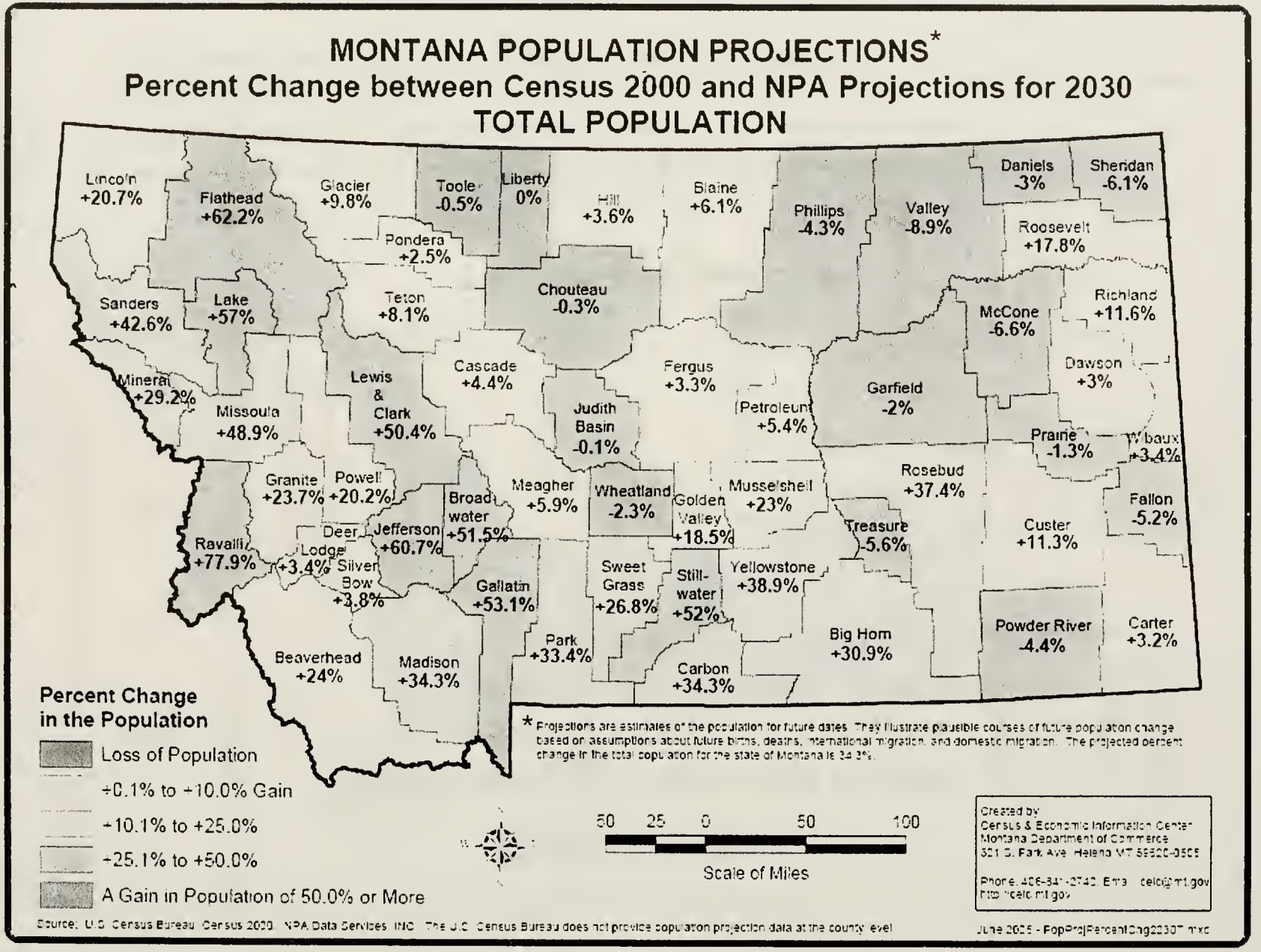

Figure 3 - Montana Growth Projections from Montana's Growth Policy Resource Book Montana Department of Commerce Community Development Division January, 2007.

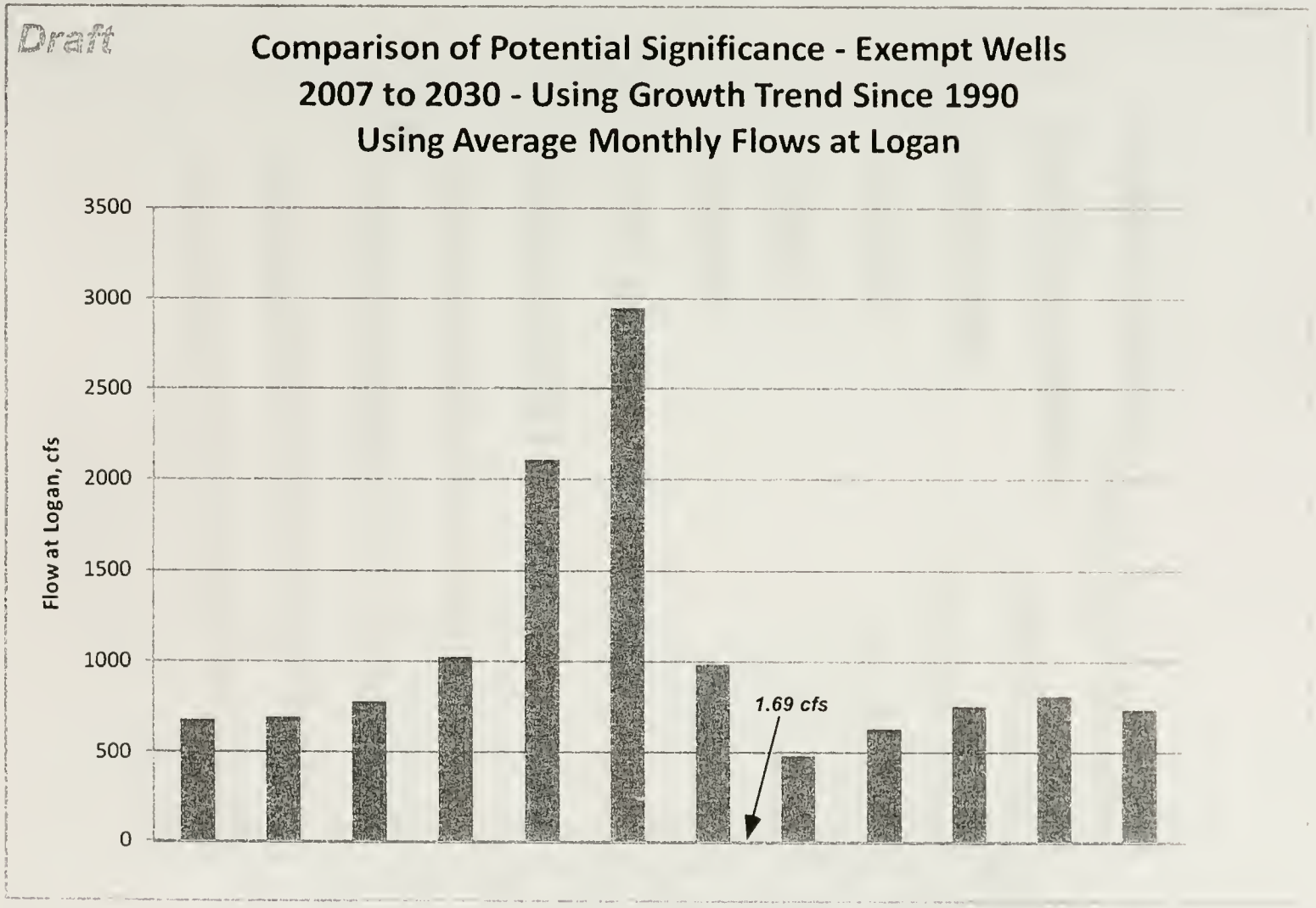

Figure 4. The 1.69 cfs shown is the calculated consumptive use associated with the growth of exempt wells from 2007 to 2030 in the Gallatin Valley. It is highly conservative as it does not include other water budget factors which would reduce the net flow rate substantially.

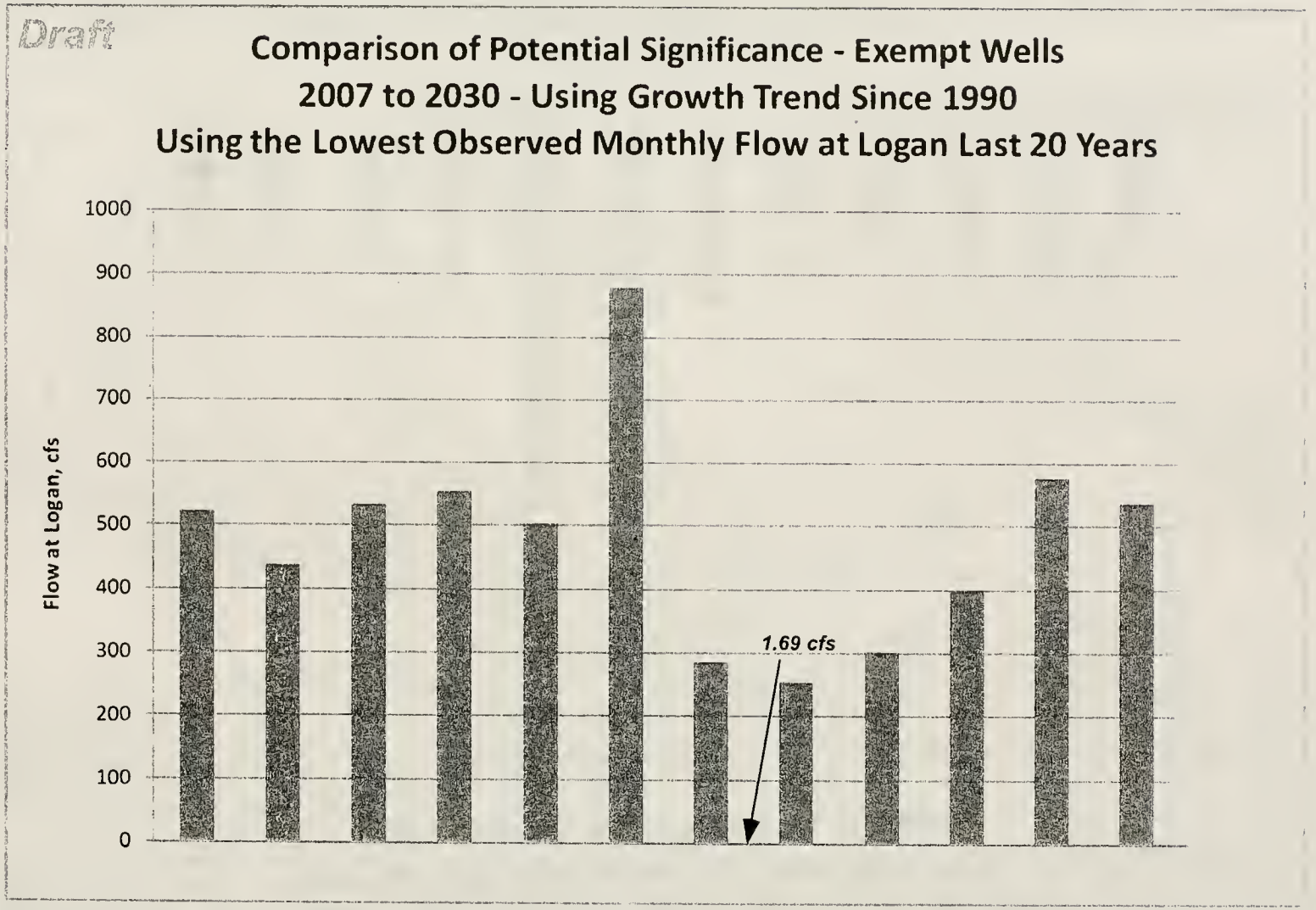

Figure 5. The 1.69 cfs shown is the calculated consumptive use associated with the growth of exempt wells from 2007 to 2030 in the Gallatin Valley. It is highly conservative as it does not include other water budget factors which would reduce the net flow rate substantially.

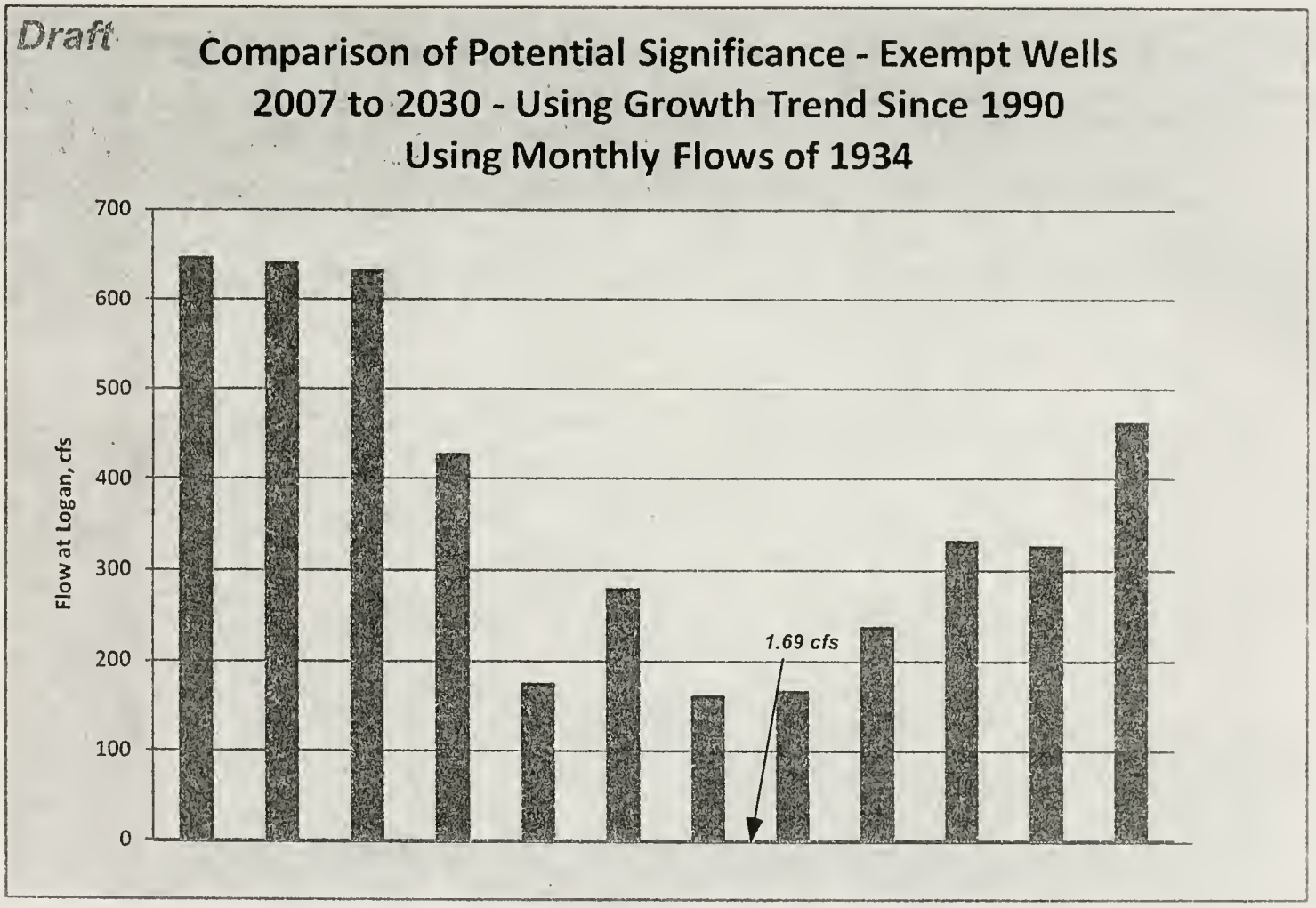

Figure 6. The 1.69 cfs shown is the calculated consumptive use associated with the growth of exempt wells from 2007 to 2030 in the Gallatin Valley. It is highly conservative as it does not include other water budget factors which would reduce the net flow rate substantially.

Figures adapted from DNRC Memorandum - Working Draft on Effects of Exempt Wells on Existing Water Rights

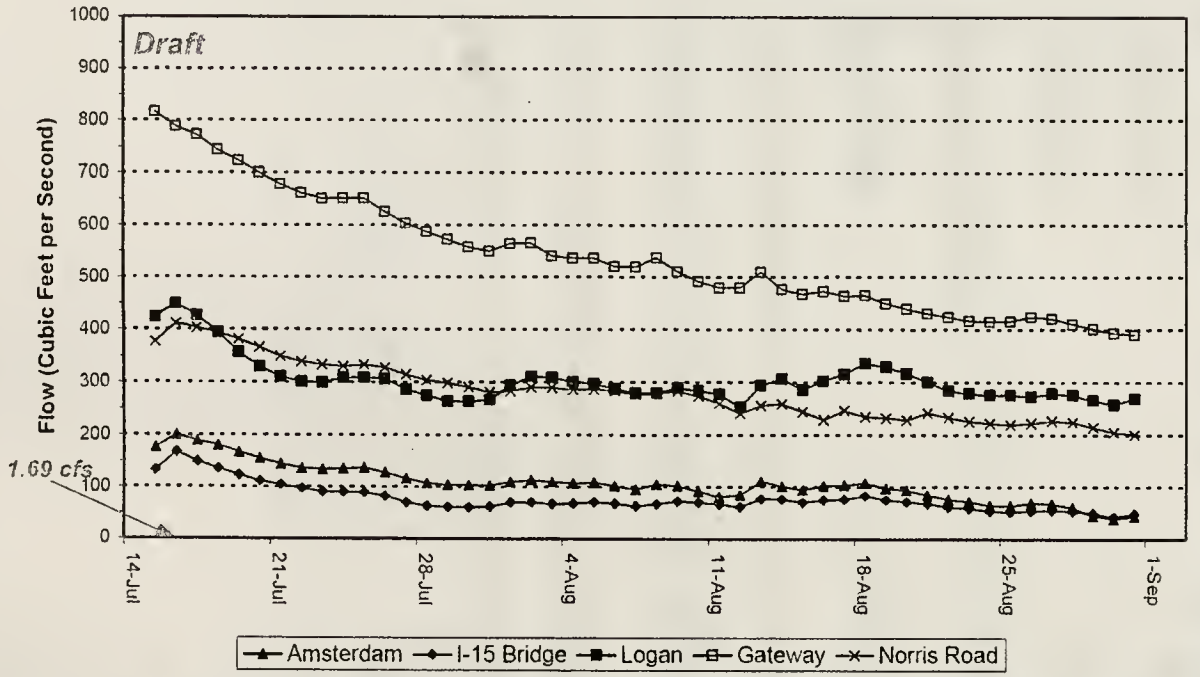

Figure 7. Figure adapted from DNRC memorandum. Note that there are other streams in the valley other than Gallatin River. Only a fraction of the exempt wells consumption in the Valley (something far less than 1.69 cfs) would be manifested at the Norris Road, I-15 Bridge, Logan and the I-15 Bridge on the West Gallatin River.

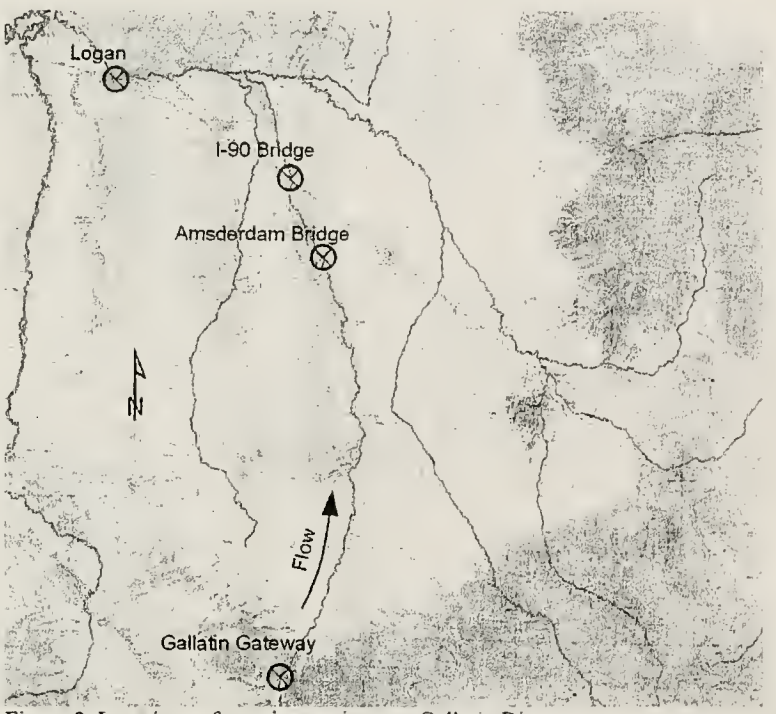

Figure 2. Locations of gauging stations on Gallatin River.

Note that the barely visible line on the horizontal axis represents the combined average flow of the increase in the number of exempt wells in the Gallatin Valley from 2007 to 2030 based upon current well development trends. Furthermore, many of the wells have been placed in areas that had been historically irrigated.

The maximum reduction in flow of 1.69 (68 miners inches) is before conducting a water budget analysis addressing all water budget factors. If all the addition and subtraction is conducted, the flow of 1.69 cfs would be further reduced.

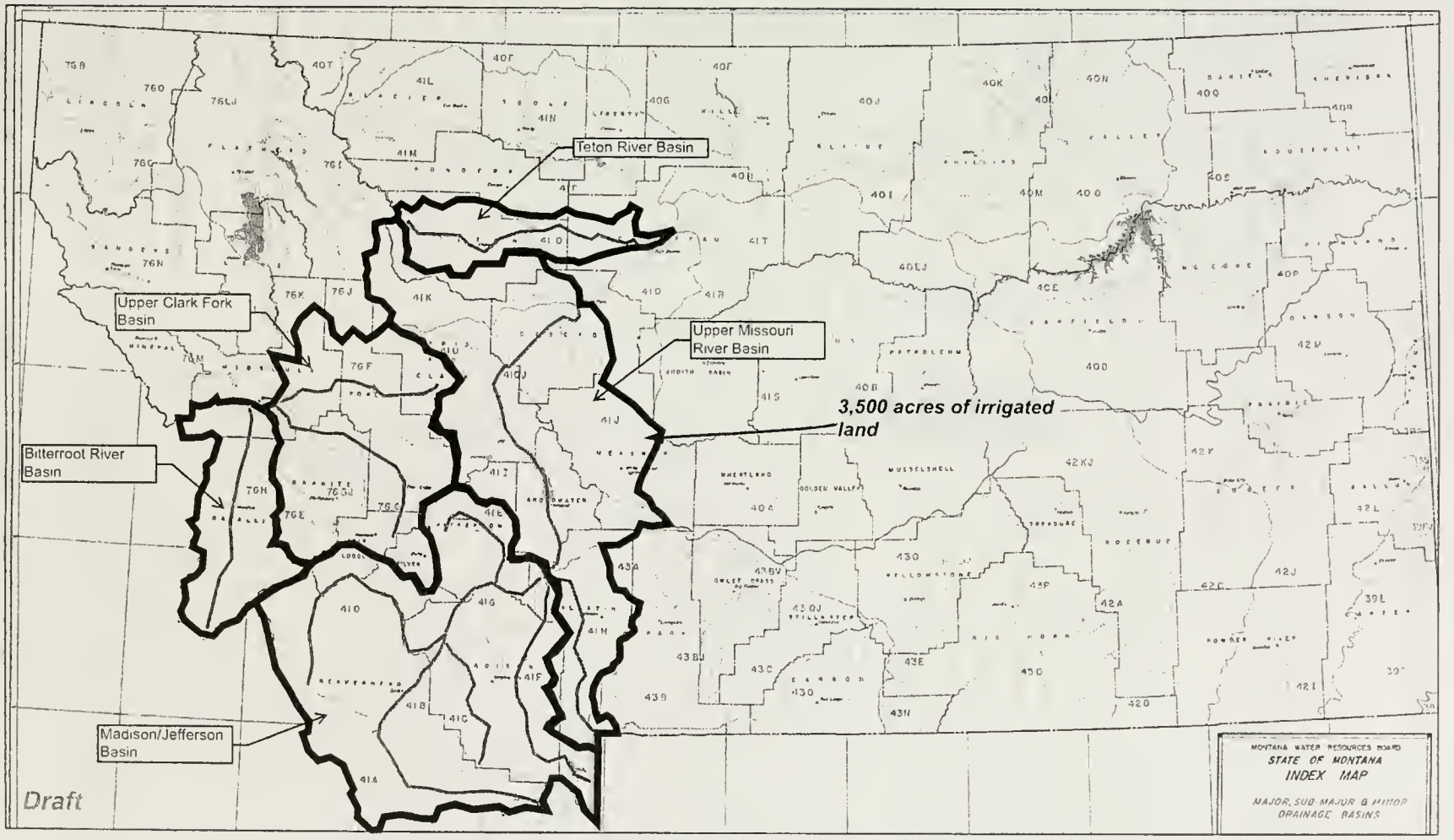

Figure 8. The Illustration above presents the relative significance of growth in exempt wells using calculations performed by DNRC to 2030 and adjusting for seasonal availability of water in accordance with principles set forth in Bredehoeft and Kendy (2008). If all the water budgeting factors are carefully considered this irrigated acreage equivalent would be reduced significantly.

Effects of Exempt Wells on Existing Water Rights

Water Management Bureau, Montana Department of Natural Resources and Conservation, Helena, Montana
February 2008

Summary
The following is a discussion of the potential effects of exempt wells on existing water rights. The concern is that exempt wells can pump water out of priority which in turn reduces the water available to senior water users during times of water shortages. This concern is elevated as exempt wells are being used for large, relatively dense subdivision development in closed basins.

Exempt wells are not reviewed by DNRC and are not subject to public notice. In contrast, permitted wells are reviewed by DNRC, and water users and the public are noticed and given an opportunity to object. Impacts caused by permitted wells are required to be identified and, if these impacts cause adverse affect to water users, must be offset through mitigation plans or aquifer recharge plans. Impacts caused by exempt wells are often offset during times of water shortages by curtailment of junior surface water right users. Even if administration or enforcement of exempt wells in priority existed, curtailment of exempt wells could be ineffective because of the delayed effect on stream flows and, therefore a call may not benefit senior surface water users.

Evaluation of streamflow records may not be an accurate way to characterize depletions by out-of-priority ground-water pumping because depletions from exempt wells can be offset by curtailed use of surface water by junior water right appropriators. At current rates of development, approximately 30,000 new exempt wells could be added in closed basins during the next 20 years resulting in an additional 20,000 acre-feet per year of water consumed. Some of this increased consumption will be offset by reduced historic consumption for agriculture where residential development is occurring on irrigated lands. However, much of the subdivision development in closed basins is occurring on lands that were not previously irrigated. In addition, there are no guarantees that historic water rights for lands developed using exempt wells will not be sold and put to new uses.

Water Rights Perspective
Ground water flow models of the Gallatin Valley by Nicklin (2005) and Kendy and Bredehoeft (2006) demonstrate how pumping and consuming ground water in closed basins can impact surface-water flows. The challenge for addressing these impacts is that depletions of surface water caused by pumping ground water, from either an exempted or permitted well, usually will take months or years to dissipate if pumping is curtailed. Ground water pumping has fallen outside of the priority system that surface water users are subject to during times of water shortages because exempt rights are not included in decrees administered by water commissioners. In any event, a call against groundwater pumping, even if enforced, may generally be futile in the short term. This can create the anomaly of a surface water right holder with a 1920 priority date for irrigation being shut off during water shortages, while a groundwater right holder with a 2007 priority date can continue pumping, even though their water use depletes stream flow. Water commissioners and district courts may increasingly be called upon to regulate exempt water uses. These exempted water users may find themselves called upon to bring

forward evidence that their exempted uses do not take surface water, or that a call by a senior surface water user would be futile.

Provisions of BH 831 codified at §85-2-360 MCA through §85-2-364 MCA provide mechanisms in addition to basic permitting criteria in §85-2-311 MCA whereby an applicant for a provisional permit for a non-exempt well in a basin closed to new surface water use can pump and use ground water if effects to senior water users, if necessary, are mitigated. Permit applicants are required under these provisions to assess potential net depletions to surface water and to offset net depletions that cause adverse effects to existing water rights through a mitigation plan or an aquifer recharge plan. The required hydrogeologic assessment generally includes a description of the properties and extent of the source aquifer to a well, the locations of surface waters connected to the source aquifer, and an evaluation of the timing and magnitude of net depletion. Most often, mitigation or aquifer recharge plans will involve retiring an existing surface water use and changing the water right to mitigate the impacts of the new use. A ground water applicant under HB 831, in conjunction with the change statute of §85-2-402 MCA, is required to demonstrate that the historic period of use and consumptive use of the right being retired will provide adequate water in priority generally during the time needed to mitigate any adverse effects of the new use. The change process ensures that the historic water right will not be expanded or used in a way that adversely affects other water users.

In contrast to permitted wells, wells pumping less than 10 acre-feet per year and less than or equal to 35 gallons per minute (gpm) maximum pumping rate do not have to meet the requirements of §85-2-360 MCA through §85-2-364 MCA or §85-2-311 MCA. These exempted wells can deplete surface water flows in the same proportion to wells that are subject to permitting requirements. For example, 100 individual wells serving a subdivision will have the same magnitude of depletion as one or more larger non-exempt wells for a public water system serving the same number of households from the same aquifer at that location. Net depletion in both cases depends on the amount of water consumed and aquifer conditions. Pumping from the permitted well should not affect senior surface water users as long as the associated mitigation or aquifer recharge plan is in effect. Depletions by the 100 exempt wells can continue unabated during periods of water shortage, affecting surface water users by decreasing the amount of available stream flow and increasing the need for some junior surface water users to curtail their use.

Nicklin (2007) argues in part that the effects of exempt wells in the Gallatin Valley are inconsequential because in-home consumption is small and because most of the consumption associated with these wells is for lawn and garden irrigation that balance consumption of surface water that was historically used to irrigate agricultural crops on the same land. Nicklin further argues that, because the number of acres irrigated for crops in the Gallatin Valley has declined, less water is now consumed than in the past. Essentially, Nicklin argues that the effects of exempt wells are mitigated ad hoc similar to formal procedures under §85-2-360 MCA through §85-2-364 MCA by merely replacing the previous irrigation uses of water with exempt uses of water.

There are many exempt wells in the Gallatin Valley that supply residential needs on lands that were previously irrigated, however, the effects of the new uses may not be mitigated. The water right for the previous irrigation use might have been severed from the land and

changed to a new use (e.g. mitigation of a permitted well), or placed of use (e.g. sold to another irrigator for use on different lands). Surface water that is supplied from storage by a ditch or canal company, as is much of the irrigation water in the Gallatin Valley is difficult to track and may simply provide expanded service to another tract. In addition, the historic irrigation on a parcel can be for the early portion of the irrigation season in the case of grains, or for flood irrigation with a lower depletion rate as compared to sprinkler irrigation, or as a result of being so junior that curtailment by a water commissioner occurs yearly. In these cases, historic consumption by agricultural irrigation may be less than summer-long lawn and garden irrigation that replaced the agricultural use. Most importantly, development in the Gallatin Valley and in other valleys in western Montana is increasing and occurring in areas that have not been historically irrigated and where increased consumption by new exempt well use is not being offset by decreased historic consumption for irrigation. Regardless of the location or past land use, the safeguard provisions of §85-2-360 MCA through §85-2-364 MCA and §85-2-402 MCA that ensure the effectiveness of mitigation for permitted ground-water uses do not cover exempt wells.

Depletions by exempt well use may not be discernible by basin-scale water balances or analysis of hydrographs of gross basin inflows and outflows, in part because these depletions are small relative to annual flows. In addition, records of consumption by exempt well use may be masked during periods of water shortage by curtailment of junior surface water uses. Low-flow measurements in July to September (Figure 1) and water commissioner records demonstrate that water shortages occur in the Gallatin River and other closed basins nearly every year and that junior surface water use is curtailed or reduced through informal sharing among surface water users. For example, surface water users with priority dates back to the 1890s are curtailed in the Gallatin during most years and, if not for voluntary reductions, the Gallatin River at Amsterdam Road Bridge and the I-90 Bridge would go dry (Compton, 2007) (Figure 2). Depletion of surface water by exempt well use continues during these periods of shortages and ultimately increases the need to curtail more junior surface water rights or the need for more voluntary reductions. The net effect is that depletions by ground-water pumping do not show up in records of total basin water outflow because they are offset by curtailed use by junior surface water users. Figure 1 also indicates that the appropriate place in the Gallatin Valley to discern water shortages is not near the mouth, but farther upstream in the vicinity of Amsterdam and the I-90 bridge. Irrigation return flow and the East Gallatin River increase flows substantially downstream.

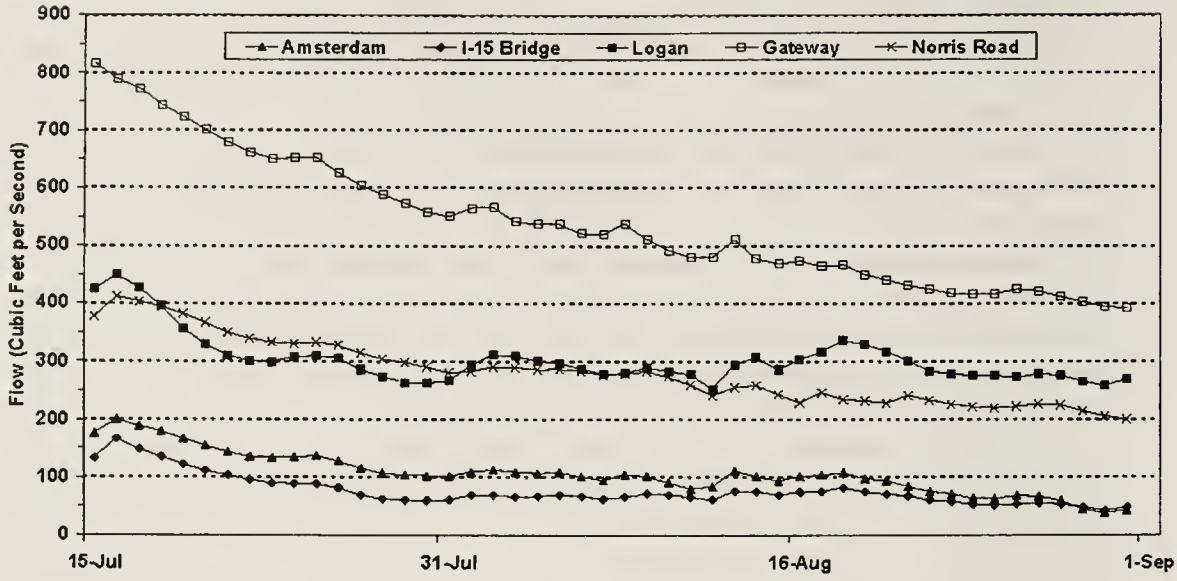

Figure 1. Flows in Gallatin River from Gallatin Gateway to Logan during the late summer of 2006.

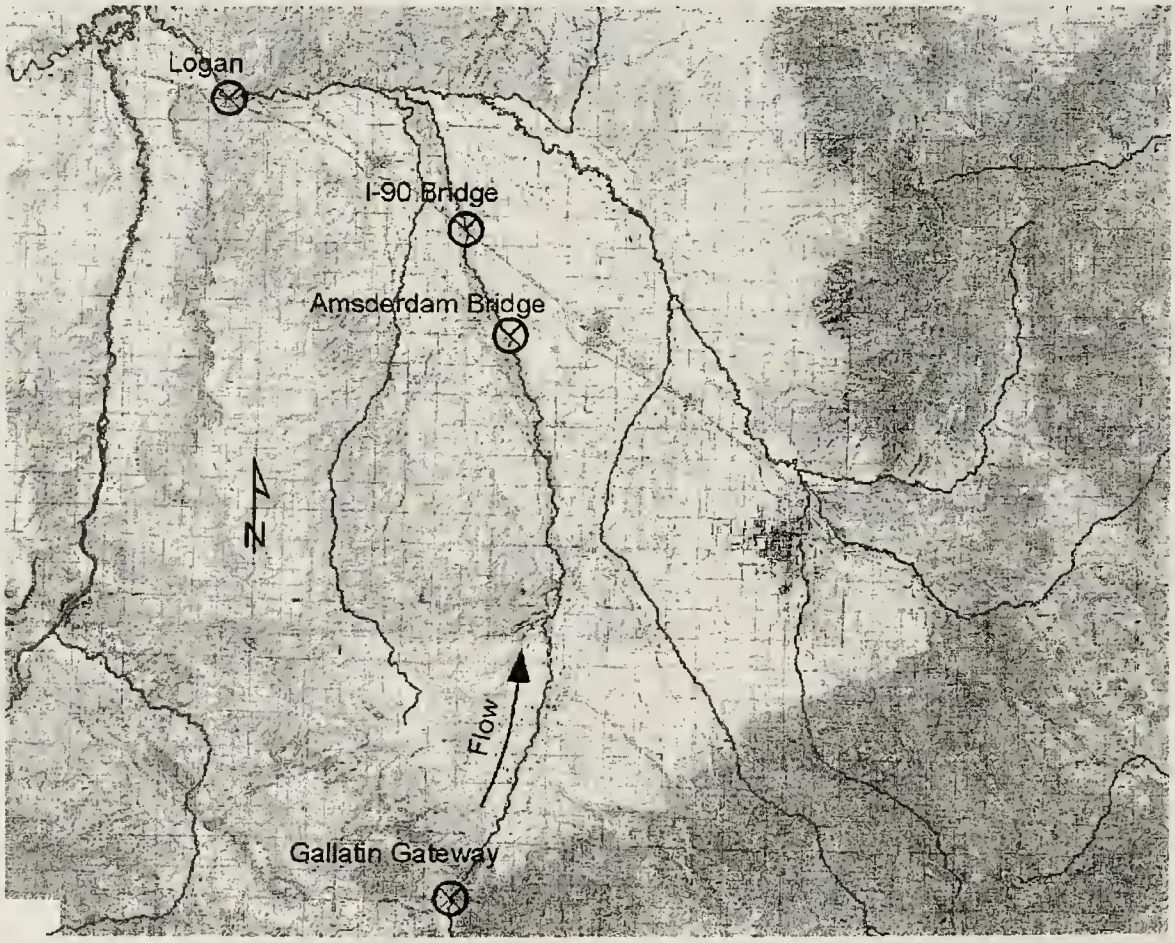

Figure 2. Locations of gauging stations on Gallatin River.

Future Exempt Well Growth and Consumption

Estimates of water consumption are presented in Table 1. Trends in the number of water right certificates issued by DNRC are presented in Table 2. These tables demonstrate the potential future effects of exempt wells. Estimates of household water use and consumption are based on the following assumptions.

- In-house water use is 187.5 gallons per day per household (75 gallons per day per person with 2.5 persons per household) based on published use (Kimsey and Flood, 1987).
- Total consumption of water used indoors and during wastewater treatment is 5 percent of the water used indoors. This rate of consumption is intermediate between an estimate by Kimsey and Flood (1987) of 2 percent for households served by municipal wastewater treatment plants and an estimate by Vanslyke and Simpson (1974) of 12 percent for households with individual septic systems. More recent site-specific research in Colorado found a combined consumption rate for indoor use and sewage disposal of about 15.6 percent (Paul, Poeter, and Laws, 2007).
- Net irrigation requirement for lawn and garden use is 16 inches per year on average based on net irrigation demand for turf for various stations in closed basins obtained from the Montana Irrigation Guide.
- Lawn and garden irrigation efficiency is 70 percent.
- Future number of exempt wells in closed basins is projected from the linear growth rate the occurred between 1991 and 2006.

Table 1. Calculated water diversion and net consumption per household.

	Acre-Feet Per Year		
	Household	**Irrigation**	**Total**
Household + 1/4 acre lawn			
Diversion	0.21	0.48	0.54
Consumption	0.01	0.33	0.34
Household + 1/2 acre lawn			
Diversion	0.21	0.95	1.16
Consumption	0.01	0.67	0.68

The number of acres typically irrigated by exempt wells is estimated by evaluating infrared aerial photography for lots associated with exempt wells the Bitterroot Valley, Helena Valley area, and Gallatin Valley. DNRC geographic information specialists delineated irrigated portions of selected properties associated with exempt wells by randomly selecting 100 exempt wells from each basin and compiled statistics presented in Table 2. Averages of estimates of irrigated acreage vary from 0.38 acres in the Helena Valley to 0.93 acres in the Gallatin Valley with an overall average of 0.67 acres and median of 0.50 acres. The intensity of irrigation varied between sites; but the data indicate that the consumption estimate for a ½ acre parcel provided in Table 1 probably is representative value for predicting overall consumption from future exempt well use.

Table 2. Estimates of irrigated acreage associated with exempt wells for the Bitterroot Valley, Helena Valley area, and Gallatin Valley.

Basin	Average (acres)	Median (acres)	Max (acres)	Min (acres)	25th Percentile	75th Percentile
Bitterroot	0.7	0.43	3.86	0.07	0.25	0.87
Helena	0.38	0.27	2.02	0.025	0.18	0.45
Gallatin	0.93	0.8	5.06	0.14	0.49	1.04

The number of exempt wells filed in the closed basins listed in Table 3 has increased steadily at a rate of approximately 1,400 per year. Based on this trend and assuming ½ acre of irrigation per residence, the number of exempt wells will increase by approximately 30,000 and consumption by these exempt wells will increase by approximately 20,000 acre-feet per year by 2030 (Table 4). Further, the number of exempt wells will increase by approximately 70,000 from current numbers and an additional 47,000 acre-feet of water will be consumed per year by 2060. From Table 1, approximately 300 homes using exempt wells with ½ acre of lawn and garden irrigation will consume about 204 acre-feet of water. This is roughly equivalent to the amount of water consumed by one center pivot irrigating 138 acres of alfalfa with a full-service net irrigation requirement of 18 inches. This calculation is provided for comparison purposes and is not an estimate of effects that will occur during the irrigation season.

Table 3. Cumulative number of filed exempt wells (minus exempt stock wells) beginning in 1991, the first year for the 35 gpm / 10 acre-foot exemption.

Year	Bitterroot	Jefferson / Madison	Teton	Upper Clark Fork	Upper Missouri	Total
1991	0	256	12	324	846	1,438
1992	455	391	18	559	1,361	2,784
1993	879	526	27	706	1,890	4,028
1994	1,274	698	30	889	2,451	5,342
1995	1,620	857	33	1,094	3,084	6,688
1996	2,027	1,008	35	1,264	3,534	7,868
1997	2,346	1,133	37	1,429	4,003	8,948
1998	2,697	1,272	39	1,598	4,551	10,157
1999	3,049	1,461	41	1,791	5,155	11,497
2000	3,355	1,605	57	2,006	5,856	12,879
2001	3,645	1,724	65	2,151	6,533	14,118
2002	3,957	1,882	71	2,267	7,142	15,319
2003	4,311	2,039	82	2,411	7,620	16,463
2004	4,682	2,226	90	2,578	8,222	17,798
2005	5,160	2,444	97	2,772	8,870	19,343
2006	5,797	2,785	145	3,056	9,847	21,630
2010*	6,900	3,200	140	3,700	12,000	26,000
2020*	11,000	4,800	230	5,400	18,000	39,000
2030*	14,000	6,400	320	7,200	24,000	52,000
2040*	18,000	8,000	410	8,900	29,000	64,000
2050*	21,000	10,000	500	11,000	35,000	77,000
2060*	25,000	11,000	590	12,000	41,000	90,000

* cumulative numbers of exempt wells for future years are estimated by linear regression

Table 4. Projected cumulative consumption in acre-feet annually for certificate wells with ½ acre of irrigation after 2006 (calculated from data in tables 1 and 2).

Year	Bitterroot	Jefferson / Madison	Teton	Upper Clark Fork	Upper Missouri	Total
2010	800	300	0	400	1,300	3,000
2020	3,000	1,400	60	1,600	5,000	12,000
2030	6,000	2,000	120	3,000	9,000	20,000
2040	8,000	4,000	180	4,000	13,000	29,000
2050	10,000	5,000	240	5,000	17,000	38,000
2060	13,000	6,000	300	6,000	21,000	47,000

Summary

The following are the main points of the preceding discussion.

- Groundwater pumping and use in closed basins has been shown through modeling to deplete surface water flows.
- Exempt wells can cumulatively deplete surface water flows proportionally to permitted wells.
- Ground-water use is difficult to curtail to avoid impacts to surface water users during water shortages under a prior appropriations system. However, water commissioners and district courts may increasingly be called upon to regulate exempted water users, so exempted water users may find themselves called to bring forward evidence that their exempted uses do not take surface water, or that a call on their exempted right by as senior surface water user would be futile.
- Provisions of HB831 provide a mechanism for authorizing permitted wells to pump out of priority with the implementation of mitigation or aquifer recharge plans.
- Provisions of HB831 and §85-2-402 MCA ensure that valid historic water rights will be used to mitigate adverse effects caused by a permitted well.
- New exempt wells are not subject to the provisions of HB831 and, therefore, can pump out of priority without mitigating adverse effects to senior water right users.
- Historic irrigation water rights that are displaced by new residential developments that use exempt wells can be severed and sold (and changed to a new place of use or a new use).
- Pumping from exempt wells can increase the need to curtail more junior surface water right uses or for more voluntary reductions during perennial periods of water shortage in closed basins.
- Depletions by exempt well use do not show up in records of total basin water outflow because they are offset by curtailed use by junior surface water users.
- Approximately 300 homes using exempt wells with ½ acre irrigation will consume 204 acre-feet of water each year, which is about equivalent to an estimated 207 acre-feet consumed by one center pivot used to irrigate 138 acres of alfalfa.
- If current trends continue, there will be a total increase of 70,000 exempt wells and 47,000 acre-feet per year of water consumption in closed basins by 2060.

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State Funding for Irrigation in Montana
and
Consequences of Converting from Flood to Sprinkler Irrigation

Water Policy Interim Committee
June 10, 2008

Information Provided by:

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GOVERNMENT ASSISTANCE PROGRAMS AVAILABLE TO IRRIGATORS

This is a list of financial and technical assistance programs available to private and public entities for irrigation related projects and activities. Some of the programs were established specifically for private irrigators, where others require a public or local government entity (conservation or irrigation districts, for example) to sponsor projects that ultimately will support private irrigators.

STATE ASSISTANCE PROGRAMS

Irrigation Development Grant Program
Montana Department of Natural Resources and Conservation Resource Development Bureau
www.dnrc.mt.gov/cardd/ResDevBureau/irrigation_development/irrigation_dev_grants.asp

Private Water Development Loans
Montana Department of Natural Resources and Conservation Resource Development Bureau
www.dnrc.mt.gov/cardd/ResDevBureau/private_loans.asp

Renewable Resource Grant and Loan Program
Montana Department of Natural Resources and Conservation Resource Development Bureau
www.dnrc.mt.gov/cardd/ResDevBureau/renewable_grant_program.asp

Renewable Resources Project Planning Grants
Montana Department of Natural Resources and Conservation Resource Development Bureau
www.dnrc.mt.gov/cardd/ResDevBureau/project_planning_grants.asp

Reclamation and Development Grants Program
Montana Department of Natural Resources and Conservation Resource Development Bureau
www.dnrc.mt.gov/cardd/ResDevBureau/rdgp.asp

Growth through Agriculture
Montana Department of Agriculture
agr.mt.gov/business/GTA.asp

Fisheries Restoration and Irrigation Mitigation Program for Montana
Montana Department of Fish, Wildlife and Parks
fwp.mt.gov/habitat/fisheriesrestoration.asp

Conservation District Grants (HB 223 Grant Program)
Montana Department of Natural Resources Conservation District Bureau
www.dnrc.mt.gov/cardd/loans_grants/cdloangrants.asp#HB223

Federal Assistance Programs

Environmental Quality Incentives Program (EQIP)
USDA Natural Resources Conservation Service
www.nrcs.usda.gov/PROGRAMS/EQIP/

Conservation Technical Assistance Program
USDA Natural Resources Conservation Service
www.mt.nrcs.usda.gov/technical/ecs/planning

Irrigation Operation and Maintenance on Indian Lands
Branch of Irrigation, Power and Safety of Dams, Bureau of Indian Affairs
www.federalgrantswire.com/irrigation-operations-and-maintenance-on-indian-lands.html

Farm Loan Programs
US Department of Agriculture, Farm Service Agency
www.fsa.usda.gov/FSA/webapp?area=home&subject=fmlp&topic=landing

POTENTIAL CONSEQUENCES OF CONVERTING FROM FLOOD TO SPRINKLER IRRIGATION

These are potential results, not all will happen in every situation. Some may occur rarely and some may occur with every conversion. Some are basin-wide and some are limited to a producer's field. Not everyone agrees on the frequency or extent of occurrence for most of the consequences listed below.

Flood to Sprinkler Conversion Effects on the Producer and Field

Labor savings and cost reduction

- Increases ability of some family farms to remain in production
- Increases ability of some producers to earn income from off-farm employment (less demand on operator's time due to automated irrigation, fertilizer & pest control)
- Reduces application rates and cost for fertilizers and other ag chemicals (due to precision application by sprinklers)

Increases productivity, especially on a non-level field

Decreases or eliminates available water for late season irrigation to downstream users

Decreases or eliminates available groundwater for downstream domestic wells

Increases ability of producer to irrigate sloped fields

Increases options for crop diversification

Increases nutrient output per acre.

Increases ability for additional harvest (late season low flows may be adequate for amount needed to sprinkle irrigate)

Increases ability to expand irrigated acreage with the same water supply

Increases the availability of water to downstream users of an irrigation system (reduced amount diverted leaves more water in the ditch)

Reduces the occurrence of losing grassland to sedge where previously over-irrigated

Increases capital investment & maintenance costs

Increases energy use and costs

Flood to Sprinkler Conversion Effects on Water Quality

Reduces contributions of ag chemicals to surface and groundwater (precision application rates apply only what the plant needs)

Reduces sedimentation to surface water by runoff of excess irrigation water

Increases late season temperatures in natural water ways (reduced return flows result in lower instream flows and less influx of cooler ground water which cumulatively tends to increase water temperature)

Flood to Sprinkler Conversion Effects on Water Quantity

Reduces the volume of water diverted for a given field

Increases loss through plant transpiration (due to increased plant production)

Changes return flow timing to increase early season surface flows and decrease late season return flows.

Increases the potential for an irrigator to divert water from a stream during low flow stage because less water is needed to adequately irrigate a field.

Increases or decreases evaporation loss depending on conditions

Increases consumptive use if crop productivity is increased
Lowers the water table
Decreases aquifer recharge
Reduces late season instream flows (through reduced diversions and return flows)
Eliminates or reduces late season return flows to groundwater and surface water

Flood to Sprinkler Conversion Effects on General Ecological Conditions

Reduces amount of water supporting wetlands
Reduces occurrence of saline seep areas
Supports early-season fish spawning by more closely reproducing natural conditions of higher spring flow vs. late season return flows.
Impairs fall fish spawning by reducing late-season groundwater return flows to surface water.
Decreases soil loss in surface reduced runoff
Decreased habitat for birds and terrestrial species

FACTORS THAT COULD INFLUENCE THE EFFECTS OF CONVERTING FROM FLOOD TO SPRINKLER IRRIGATION

Field Conditions the Influence the Effects of Converting to Sprinkler Irrigation

Topography (level or uneven field)
Soil texture & structure (affects drainage characteristics)
Changes in irrigated acreage or crop type due to transition from flood to sprinkler irrigation
Field shape (flood to center pivot may leave corner acreage un-irrigated on a square field)
Field size
Slope (flood irrigation produces more runoff, less infiltration sloped field)
Soil depth
Soil chemistry (pH)
Variability of these factors within a field
Crop type (grass vs. alfalfa hay, sugar beets vs. potatoes)
Crop demands (nutrients & other chemical needs)

Hydrologic Conditions

Depth to water table
Water source & availability
Receiving water for return flow (irrigation ditch, aquifer, stream)
Fishery instream flow demands

Operational Conditions

Financial feasibility
Distance of operator from field
Labor availability
Distance of water source from field
Diversion type
Diversion location
Use of subirrigation (sometimes supplemented or extended by flood irrigation)
Cost of electricity and fuel
Cost of transportation to market

Climatic Conditions

Wind
Solar influences
Precipitation
Evaporation rates

External Factors

Existing uses of flood irrigation return flows
Availability of reserved water rights (from Conservation Districts or Tribal Compact agreements)
Cooperative agreements with other water users
Legal restraints on water use (water rights, TMDLs for instream flows)
Status of water rights in a basin

Appendix I

Kolman, Joe

From: WmGBallinger [wgb@mt.net]
Sent: Sunday, July 06, 2008 1:20 PM
To: Kolman, Joe
Subject: Water

I write only to congratulate the committee for their foresight in tackling this problem, especially in view of California's recent awareness of a drastic shortage of water this summer.

Respectfully yours,

William G. Ballinger, M.D.

CLARK FORK COALITION

August 4, 2008

Water Policy Interim Committee
Senator Jim Elliott, Chair
Senator Gary L Perry, Vice Chair
Senator Larry Jent
Senator Terry Murphy
Representative Scott Boggio
Representative Jill Cohenour
Representative Bill McChesney
Representative Walter McNutt
cc: Joe Kolman, Staff

Re: Clark Fork Coalition Comments on Water Policy Interim Committee Draft Legislation and Findings

Thank you for the opportunity to comment on the WPIC's Findings and Options for Recommendations, as well as the Committee's draft legislation. The Clark Fork Coalition appreciated participating in the WPIC's meetings and discussions over the past year, and applauds the Committee's dedicated efforts to learn more about the intricacies of our state's ground and surface water.

Please find below the Coalition's comments on the options and draft legislation relevant to our members and residents of the Clark Fork watershed. We look forward to working with you to continue the conversation on how best to address the challenges and opportunities facing Montana's water resources.

Water Policy

>> The Coalition supports making the WPIC a permanent interim committee. This step will help create institutional knowledge of the science and history behind Montana's water supply, and also aid in generating proactive policies to address future water needs.

LC 5007 - Ground water investigation program:
The Coalition is in favor of collecting accurate, accessible scientific data to help the State and counties allocate, measure, and monitor water withdrawals. Though the costs of a comprehensive statewide hydrogeologic study are not feasible, focusing money and MBMG efforts in the high-growth sub-basins will allow more informed permitting for water use.

We hope that an expanded MBMG study would be focused narrowly enough to provide data on surface-groundwater interactions. To this end, we recommend

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defining a list of "prioritized subbasins" in Section 1 (2), which the steering committee can then further narrow.

The Coalition also urges the WPIC to consider directing MBMG to provide the public with **a basic model for predicting impacts from future water withdrawals/changes in the studied sub-basin,** as a practical component of the data collected and analyzed.

General Water Quantity and Quality

>> We recommend updating the Controlled Groundwater Area petition process in 85-2-506 to allow local governments a more flexible and less costly way to petition for such an area. Controlled Groundwater Areas are an important, tried-and-true tool for managing water, particularly in many regions of the quickly-growing Clark Fork Watershed, and will become more relevant as the demand on our water resources increases.

LC 5012 - MDT water rights for wetland mitigation

The Coalition is **not in favor** of creating an exemption under 85-2-306 for the Montana Department of Transportation to appropriate ground or diffuse surface water without a permit from the DNRC. Concerns include:

- No set limit on the volume allowed for the proposed MDT appropriation exemption.
- Creating additional exemptions from the permitting process when many of our streams and rivers are already over-appropriated, many are chronically dewatered, and the State is already struggling to monitor and manage existing groundwater withdrawals, much less additional unregulated withdrawals.
- Any "recreated" wetlands constructed under the Clean Water Act should also be subject to statewide performance standards to ensure that the State's water is being used for scientifically valid, and ecologically beneficial wetland mitigation.

The Coalition **recommends an expedited DNRC permitting process for MDT** to ensure road construction activities comply with the Clean Water Act, but not an exemption for water appropriation.

Government Issues

>> The Coalition supports increased coordination between DEQ, DNRC, and MBMG. We also recommend **requiring a central reporting system for all exempt wells,** especially for new subdivisions and for wells drilled near individual septic systems. This is critical for monitoring and managing water quality and quantity.

LC 5014 - Local government authority to require public water/wastewater systems

The Coalition supports this bill draft. It's a valuable first step in allowing counties to assume more control over their water resources through the use of centralized water and sewer systems.

However, since most county planning and health departments lack the necessary resources, money, and data to practically execute the authority granted by LC 5014, we recommend **considering additional incentives for local governments to preferentially approve subdivisions with central water/wastewater systems**—such as a DEQ/DNRC funding program designated to providing counties more staff resources if they choose to enact this authority.

Water Use Enforcement

>> We'd like to note that in order to effectively enforce water rights, the State must require reporting of all water use, including exempt wells (as stated above), and also actively **monitor future exempt wells' and permitted groundwater wells' water use**.

LC 5021 – Revising water enforcement laws

The Coalition strongly supports WPIC's attention to better enforcing water use in the state to ensure that senior water rights are protected. The Coalition supports LC 5021, especially 3-7-311(4). However, we believe that **water enforcement should stay at the state level** – such as with the Attorney General as proposed in 5021 – rather than at the county level. County staff, including attorneys, are already over-stressed and ill-equipped to deal with the complex intricacies of water law.

Water Supply and Sewage Disposal

>> The Coalition commends the WPIC on the many in-depth discussions and presentations on the status of individual wells exempt from the permitting process. We believe **the cumulative impact of exempt wells is the single biggest challenge facing the Clark Fork basin's water resources**, as the "free giveaway" of water threatens senior water right holders, water quality, fish and wildlife, and future water supplies.

We recommend amending 85-2-306(1) to reflect today's changing demands on our groundwater—this means the exemption cannot be applied to subdivisions. In addition, the well volume of 10 acre-feet per year designated in this statue is excessive for domestic or stockwater tank needs. The Coalition recommends amending the exempt volume to one or less acre-feet per year. These suggestions correlate to Options J, K, and L in the WPIC report.

Option P—not allowing fish/private ponds to utilize the exemption—is also important to the Coalition and our members. Private ponds are more and more popular with residents moving to the Clark Fork watershed, adding to the unregulated water withdrawals plaguing our already-dewatered tributaries, particularly in the Bitterroot Valley. Solutions include: 1) amending the total volume allowed for individual exempt wells to one or less acre-feet per year, and 2) requiring the reporting of all exempt wells to better track and monitor water use.

We don't believe that Options M and N are valid solutions to best encourage public/community water and wastewater systems. However, Option O has merit for tracking and mitigating new subdivisions' water use in closed basins in a timely, cost-effective way. In effect, a "mitigation credit" for groundwater withdrawals could be modeled after the federal Clean Water Act's wetland mitigation program, where MDT can purchase wetland credits from a mitigation bank—a landowner/private entity that has restored a wetland in a nearby region, such as the Upper Clark Fork Mitigation Bank (http://www.ecosystempartners.com/projects_ucfmb.htm)—to offset the destruction of any wetlands during road construction.

A groundwater mitigation credit would be purchased by the developer to offset the net depletion as part of the DNRC's permitting process. Mitigation water could come from a large block of reservoir water or retired senior water rights transferred to instream use within a pre-determined radius—the region appropriate to provide mitigation water can be designated geographically by subbasin. The water would be readily available in a "bank" administered by the DNRC, a local authority, or a private entity, cutting down on the current costly and time-consuming process under 85-2-362 of locating, purchasing, and transferring the mitigation water.

LC 5019 – Permits for subdivision water systems

While an interesting first step at creating a solution for subdivisions seeking a new groundwater appropriation, this draft bill ultimately **falls short of addressing the exempt well problems** discussed above.

The Coalition appreciates that this bill recognizes a "subdivision water system" as a withdrawal of groundwater by 2+ wells. This is crucial in acknowledging that multiple individual wells constitute a combined appropriation (even if not physically manifold).

The main reason the Coalition does not support LC 5019 is because it violates Montanans' constitutional rights under the prior appropriation system. This bill would limit the ability of water right holders to object or comment during the permitting process by eliminating 85-2-307 to 311 for subdivision water rights. We believe this is an unacceptable method of administering water use permits.

However, we would be supportive of creating other incentives for streamlining the permitting process for a "subdivision water system," especially if this streamlined permit requires residential/urban water conservation practices, such as grey water systems or rainwater catchments for lawn and garden irrigation, and water metering for each unit.

If the bill is introduced, the Coalition urges the WPIC to make sure any "baselines" defining what constitutes a subdivision water system (as outlined in 85-2-102 (23)) are a reasonably low threshold for requiring a permit. Setting numbers on minimum volumes or lot sizes will only encourage subdivisions to find "loopholes" that fall under that specified threshold rather than applying for the groundwater permit.

>> LC 5020 – DNRC permitting/change revisions

The Coalition supports the proposed changes to the DNRC permitting process. These changes would provide much-needed expedition and streamlining of permit requests for those looking to appropriate new water supplies, while still allowing public process and transparency for existing water users. Our hope is that a more time- and cost-efficient system will encourage developers and water users to apply for groundwater permits rather than opt toward unregulated and unmonitored exempt wells.

Conclusion

Again, the Clark Fork Coalition commends the WPIC members and staff for their commitment to protecting Montana's water resources. We've enjoyed working with you this past year, and look forward to continued dialogue on how to best meet the needs of all water users in the Treasure State, including fish and wildlife. Please feel free to call anytime to discuss these recommendations and comments.

Sincerely,

Brianna Randall
Water Policy Director

Karen Knudsen
Executive Director

Appendix A. Clark Fork Coalition's general water policy recommendations.

Protecting Montana's Valuable Water Resources

1. Water resource planning must always take into account the West's hydrologic variability, recognizing that our supply is not fixed.

2. Link land-use decisions to water availability, especially in fast-growing counties that rely on groundwater for new development. New developments must provide water supply assessments that analyze: (1) sustainable, long-term supply; (2) impacts on other water users, including fish and wildlife; and (3) alternative sources.

3. Set a goal of "no net increase" of natural water use for new developments (i.e. no new dams for storage), and encourage conservation as the main source of "new" water.

4. Create incentives and mandates that boost both urban/residential and rural/agricultural water conservation: i.e. enable creative re-use of water with local goals for developing rainwater catchments and grey water systems as sources for irrigation and lawn/garden water.

5. Recognize linkage between energy and water demands by accounting for: (1) the energy costs of developing new water supply options; and (2) impacts on water use from oil, coal, hydropower, and gas development.

6. Foster regional cooperation among existing public and private water managers, and encourage the creation of new watershed management authorities.

7. Clarify relative rights of existing water users by streamlining and expediting state water departments' permitting and adjudication processes, and by completing negotiated settlements of Native American reserved water rights.

8. Fund local watershed groups and water districts that initiate stream restoration, water conservation, and education efforts through grants and loans.

9. Encourage public dialogue and community-supported policy changes by educating policy makers and the public about the impacts of growth and climate on our water supply: For examples, see Clark Fork Coalition's *Low Flows, Hot Trout* report, available at www.clarkfork.org and details on the upcoming "Headwaters Summit," available at www.northernrockies.org.

10. Restore and protect rivers, floodplains, and wetlands to benefit the overall public safety, water quality, and ecosystem services in the West's inter-connected watersheds.

Montana Chamber of Commerce

Your Business Advocate

Webb Brown
President/CEO
Montana Chamber of Commerce
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Helena, MT 59624

To members of the Water Policy Interim Committee,

One very important issue that has become a part of the committee's running agenda is exempt wells. We understand that some members of the committee believe exempt wells are to blame for reduced water quantity and water quality.

The business community is opposed to changes in the exempt well statute at this time. Numerous small businesses depend on exempt wells to open their doors and serve their customers. But this is not just an issue that affects small business. More specifically, we are very concerned about how changes to exempt wells will also have a direct impact on the issue of affordable workforce housing.

Many communities in western Montana have seen real estate prices increase substantially over the past decade. Prices of new starter homes and existing homes have climbed to unattainable levels for average workers, making it difficult for all employers to attract new employees to the area. But the issue of housing is also an issue in rural areas, especially in eastern Montana. In places like Sidney and Glendive, there are simply no houses available. Affordable workforce housing is a problem affecting the whole state.

Changes to the exempt well statute would have a negative impact on the price of new homes in some areas and the availability of homes in other areas. Without providing proven, predictable and cost-effective alternatives, narrowing or removing the exempt well statute will only exacerbate the housing problem facing many working Montana families.

Not only would changes have a negative impact on development and affordable housing, but scientific data shows the changes would have no significant impact on water quantity. A study conducted by Nicklin Earth & Water, Inc., on the effects of exempt wells in the Gallatin Valley showed little impacts to water quantity:

> "*Ground-water use from wells is inconsequential when compared to stream flows. For instance, total domestic (household) consumption of ground-water from exempt wells is negligible and equates to about 0.01% of Gallatin River flow*

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entering the valley annually. A worst case estimate for consumption from lawn and garden irrigation in the Gallatin County associated with exempt wells equates to about 0.02% of the water entering the valley annually. For another perspective, the total amount of consumptive use from all exempt wells combined in Gallatin County equates to about 3 to 9 percent of the total ground-water consumption lost to cottonwoods and willows in the Gallatin Valley. A worst case estimate of consumption from other irrigation wells equates to less than 1.7% of the water entering the valley annually."[1]

Before the state takes the exempt well option off the table, reforms should be made to the current water permitting process, which often does not allow for timely or cost effective permitting of community water systems. Once the state has shown it can provide timely and cost effective alternatives to exempt wells, the state could revisit the exempt well statute if negative impacts can be shown with scientific data.

Thank you for your attention to our concerns on exempt wells. We are grateful for the work you have done on this important issue. Your service to the people of Montana is greatly appreciated.

Sincerely,

Webb Scott Brown
President/CEO
Montana Chamber of Commerce

[1] *Gallatin Valley Water Resources Evaluation: A Test of the Rationale of Montana Department of Natural Resources & Conservation Proposed Legislation to Amend Montana Water Law*, Nicklin Earth & Water Inc., (January 2007).

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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MEMORANDUM

TO: Water Policy Interim Committee

FROM: John E. Tubbs, Administrator

RE: WPIC Proposed Legislation LC 5019, LC5020, LC5021

I thank the committee for providing the opportunity for comment on its legislation drafts. The following are our comments or concerns.

LC5019: Permit Process for Subdivisions

The Department understands the motivation of the committee to identify a fast-path permitting process encouraging public water supply wells. However the LC 5019 has a number of provisions that raise serious concerns. The Department raises these concerns now so that the Committee is aware that the draft legislation, if enacted, may not withstand a legal challenge.

Further, a recent district court case in New Mexico may create significant uncertainty West- wide as to the validity of any exception to the permit and change process (*Bounds v. State Engineer of New Mexico*, Judge J.C. Robinson Sixth Judicial District Court of New Mexico). LC 5019 creates a 3,000 acre-foot exception for subdivision development, greatly expanding the current exception, a move in stark contrast to the move to reduce exceptions in other states.

New Section 1. Subdivision water systems in closed basins
Subsection (1)
This Subsection singles out one type of beneficial water use above all others for an expedited process, subdivision water systems. Neither the Montana Constitution nor the Water Use Act has a preference for any particular type of use. It should be noted that subdivisions of a certain size are generally required to create parkland. Water use for these types of subdivisions would not be allowed under this Subsection because the provision includes only lawn and garden associated with a household.

STATE WATER PROJECTS BUREAU (406) 444-6646
WATER MANAGEMENT BUREAU (406) 444-6637
WATER OPERATIONS BUREAU (406) 444-0860
WATER RIGHTS BUREAU (406) 444-6610

The change application submitted with the permit application would have to be for the sole purpose of providing mitigation water for the permit. The applicant could not include changing part of his right to mitigation and another part to other purposes, points of diversion or place of use.

An application under this Subsection would be processed under the Department's "correct and complete" process §85-2-302, MCA, like all other applications for permits and changes. If the combined application also included a change application for a mitigation plan, both the permit and the change application would have to be determined to be correct and complete before the combined application would be determined to be correct and complete and ready to move forward to be analyzed under the terms of this statute. A correct and complete determination would not be a determination by the Department that the applicant met all of the criteria necessary for issuance of the permit and change, but only a determination that the combined application could move forward for analysis.

Subsections (2) and (3)
The Department has constitutional concerns with Subsection (2) where the application for permit as well as the application for change (if necessary) will not be public noticed and existing water right holders will not be provided opportunity to file an objection. Our concern is that this section, especially the change provision, may run afoul of the Constitutional right to due process (Art. II, §17), Constitutional right to know and participate prior to agency action (Art. II, §8 and Title 2 Chapter 3 Part 1, MCA), and the Constitutional protection of existing water rights (Art. IX, §3).

With the application not being subject to §85-2-311, MCA, no analysis would be required or could be conducted of impacts to existing ground water rights within the area of potential effect. In Subsections (2) and (3), the only analysis and determination to be made is that the applicant's mitigation plan will meet §85-2-362, MCA, such that surface water rights are protected and depletion fully mitigated. A proposed ground water well could pump and take water from another well and the Department could not address this issue in the permitting process because of the inapplicability of the §85-2-311, MCA criteria.

In Subsection (3)(a), it is important that the legislation retain the language expressly giving the Department the right to determine depletions and that the depletions would be fully offset by the applicant's plan. It is also important to retain the language giving the Department the right to review a proposed change in appropriation right against the applicable criteria in §85-2-402, MCA

Subsection (3)(b) requires the applicant to require each connection to install a water meter. However there is no provision requiring the meters be read or recorded. If it is a condition of the permit, the information gathered should be sent into the Department annually, and it then becomes public record. Otherwise, the public may have difficulty accessing water right records if there is a concern.

Subsection (2)(f) requires the applicant to have a plan for monitoring and enforcing the uses of water under the permit and the conditions. What is the Department's role in enforcing the permit conditions? Is the applicant required to have covenants addressing the requirements under the statute, ex lawn size. What happens if water use records are not kept?

Subsection (5) provides for judicial review of the department's action. How long does a party have to file a petition with the court in this review outside of the traditional review under the Montana Administrative Procedure Act (MAPA), Title 2 Chapter 4 Part 7. Under MAPA, one has 30 days to file for a judicial review.

85-2-102 Definitions:

In Subsection (12) we would suggest limiting the irrigation to 1/4 acre.
In Subsection (23) a suggested cap of 3,000 acre-feet (AF) is made. At .73 AF per household, subdivisions of 4100 lots would be allowed under this new Subsection. This volume of water could certainly have an impact to existing ground water users in some areas. This volume far exceeds the amount applied for by most applicants.

LC5020: Preliminary Determinations and Informal Objection Process

The Department thanks the Committee for its consideration of this legislation. We believe that the proposed changes will improve water right processing for all parties. Existing water right holders will particularly benefit by keeping the burden of proof on applicants to meet the permitting and change criteria and by minimizing the need to object to applications that the Department seeks to grant.

In 85-2-307 there appears to be a format problem. Sub-section (b) is missing.

85-2-308(2) cross references the criteria in -320, -402, and -436. There should be a cross reference to -407 and -408 the provision for temporary changes and temporary changes for instream flow.

LC5021: Special Masters for Judicial Enforcement

85-2-114 says the Department may petition the district court to:

We suggest inserting new (a)

(a) appoint a water master as a special master. Then current (a) becomes (b).
(b) regulate the controlling works .....

Managing Montana's Water: Challenges Facing the Prior Appropriation Doctrine in the 21st Century

By the Clark Fork River Basin Task Force

July 2008

This paper is prepared by the Clark Fork River Basin Task Force (Task Force)[1] to review the status of Montana's water allocation and management system and then to examine the challenges facing it. Montana water law is based on the prior appropriation doctrine which is commonly summarized by "first-in-time, first-in-right."[2] First-in-time, first-in-right means that water use is based on water rights with a priority determined by when water was first put to a beneficial use. Increased competition for water resources and increased management complexity are creating challenges for implementation of this doctrine. The challenges result from reliance on individual water users for administration and enforcement that threatens the viability of water rights, groundwater development that impacts surface water, choices related to domestic water sources, and federal statutes and regulations that constrain the operation of federal water projects and river flow.

History of Montana Water Allocation and Management

Pre-1973

Prior to the passage in 1973 of the Montana Water Use Act, the right to use water in Montana was obtained simply by putting it to a beneficial use.[3] No central compilation of water rights existed. Resolution of water right disputes and adjudication of water rights occurred in local courts in actions brought by individuals.[4]

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[1]The Clark Fork River Basin Task Force was created in 2001 pursuant to a state statute, 85-2-350 MCA. This statute requires that members of the Task Force be representative of the water interests and sub-basins in the Clark Fork River basin. It charged the Task Force with developing a water management plan for the basin that identified options to protect the security of water rights and provided for the orderly development and conservation of water in the future. The Task Force presented the *Clark Fork Basin Watershed Management Plan* to Montana's governor and legislature in September 2004. The *Plan* was subsequently adopted by the Montana Department of Natural Resources and Conservation into the State Water Plan. For more information about the Task Force see http://dnrc.mt.gov/wrd/water_mgmt/clarkforkbasin_taskforce/default.asp.

[2]In 1894, the Montana Territorial Legislature established the riparian doctrine as the means of allocating water. In this system, title to water is granted to landowners whose property is adjacent to rivers and streams. It was not until 1921 that the Montana Supreme Court rejected the riparian system in favor of prior appropriation. See Shovers, "Diversions, Ditches, and District Courts," *Montana - The Magazine of Western History*, Spring 2005.

[3]Stone, *Selected Aspects of Montana Water Law,* 1978, page 28.

[4]In 1903, the Montana Legislature established the Montana State Engineer's Office and charged the State Engineer with surveying the state's water systems to determine annual flows and with overseeing implementation of an 1894 federal statute that allowed private companies to develop irrigation systems. In 1934, the Legislature created the Montana State Water Conservation Board (SWCB) and authorized it to investigate and fund water storage and irrigation projects. In 1965, the Legislature abolished the Montana State Engineer's Office. Two years later, it replaced the Montana State Water Conservation Board with the Montana Water Resources Board (MWRB) and directed it to prepare a state water plan. See Shovers, "Diversions, Ditches, and District Courts," *Montana - The Magazine of Western History*, Spring 2005. According to Shovers, the same 1967 statute required "...that all water-right holders must make a declaration of their appropriation to their county clerk, who, in turn, would forward them to the board in Helena to be compiled into a comprehensive inventory of water resources." The Board did not compile a comprehensive inventory. Neither the State Engineer, SWCB, or MWRB had the authority to resolve

Post 1973

In 1972, Montanans adopted a revised Constitution. Article IX, Section 3 of the new Constitution includes several provisions regarding water and water rights. It recognizes and confirms existing water rights. It asserts that "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people..." It subjects state waters "...to appropriation for beneficial uses as provided by law," and requires the legislature both to "...provide for the administration, control, and regulation of water rights and ... establish a system of centralized records, in addition to the present system of local records." In response to latter directive, the Montana legislature passed the Montana Water Use Act in 1973. This Act established a centralized record system for water rights and required that all water rights existing prior to July 1, 1973 must be finalized through a state-wide water rights adjudication in state courts. It also provided that a new water right or a change to an existing right requires a permit from the Montana Department of Natural Resources and Conservation (DNRC).[5]

Adjudication

To "expedite and facilitate" the state-wide water right adjudication, the legislature passed SB 76 in 1979. SB 76 mandated a comprehensive adjudication of all pre-1973 water rights in a newly created Montana Water Court. It also created the Montana Reserved Water Rights Compact Commission and charged it with negotiating federal and tribal reserved water rights.[6] Twenty-five years later, the Water Court had issued 42 temporary preliminary decrees, 14 preliminary decrees, and 6 decrees that are sometimes labeled as final, but will have to be re-opened.[7] A major reason for the slow pace of the adjudication was insufficient staff and funding for the DNRC to carry out its claims examination responsibilities.[8] In 2005, the legislature passed a water rights fee to increase funding to DNRC and the Montana Water Court in an attempt to complete the adjudication by 2020. DNRC hired 30 additional staff and was on pace to complete its examination work by 2015.

Surface Water Appropriations

Historically, under the prior appropriation doctrine, Montanans obtained water for new uses by acquiring new surface water rights. However, by 2007 the era of new surface water rights supporting new uses was essentially over. Many of Montana's major river basins were closed to

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water right disputes or adjudicate water rights. This authority remained in local courts.

[5]*Water Rights in Montana*, published by the Montana Department of Natural Resources and Conservation, the Legislative Environmental Quality Council, and the Montana University System Water Center, February 2006, page 3.

[6]Federal reserved water rights were created by the United States Supreme Court in its ruling in Winters v. United States [206 U.S. § 564 (1908)]. The Supreme Court held that when Congress or the President sets aside land out of the public domain for a specific federal purpose, such as an Indian reservation, National Park, or National Forest, a quantity of water is impliedly reserved which is necessary to fulfill that primary federal purpose. A federal reserved water right has a priority date as of the date the land was withdrawn and the reservation was created; it cannot be lost through nonuse.

[7]*See* Mont. Code Ann. § 85-2-237 (reopening and review of decrees).

[8]"White Paper on the Montana Water Rights Adjudication" issued by the Upper Clark Fork River Basin Steering Committee on March 2, 2004, page 8.

new surface water rights, with specific exceptions for some uses. The closed basins included the upper Missouri, Jefferson, Madison, Teton, upper Clark Fork, Bitterroot, and the Musselshell. The mainstem of the Milk River was closed. The unquantified Salish and Kootenai Tribal water rights and a 2006 DNRC hearing's officer ruling may have effectively closed the Clark Fork River basin to new surface water rights.[9] Several individual creeks were also closed by petition and administrative orders during a portion of each year. Water right compacts with federal agencies and Indian tribes had closed certain water sources to new appropriations.[10] Even in areas not closed, a new surface water right would be the most junior for a given water source. The new user would be entitled to "wet" water only after all other senior rights are satisfied.

Water Reservations

The 1973 Water Use Act allowed state or federal agencies or political subdivisions of the state to apply to the Board of Natural Resources and Conservation to reserve surface and ground water for present and future beneficial uses, including municipal, irrigation, instream flows, and water quality.[11] Large instream flow reservations were granted for the upper and lower Missouri River basins and the Yellowstone River basin. No reservations have been granted in Montana basins west of the Continental Divide to reserve water for future use.[12]

Mechanisms to Provide for New Water Uses

The ending of the era of new surface water rights means that new water uses will depend on one or more of three mechanisms: changes to existing water rights, contracting for stored water, or using ground water. Ground water will be discussed in the next section of this paper. The efficacy of changes to or purchases of existing rights depends on two things, completion of the water right adjudication so that one can be confident in the status of a pre-1973 water right and the user friendliness of the administrative system for changing water rights. While some water may be available from privately or state owned reservoirs and other water bodies, the most likely source of storage for new water uses is the large federally owned reservoirs: Fort Peck, Tiber, Canyon Ferry, Hungry Horse, Koocanusa, and Yellowtail. Contracts from these reservoirs will also be discussed below. Another possibility is aquifer storage and recovery - injection of surplus surface water into aquifers for latter drafting by wells.

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[9]In denying water the right permit Application No. 76N-30010429 submitted by the Thompson River Lumber Company, DNRC found additional water from the Clark Fork River not to be "reasonably available" and that the proposed diversion would adversely affect a prior appropriation at Noxon Dam. DNRC determined that the applicant proved that water is "...only available when Clark Fork River flows exceed 50,000 cfs which is only on average 16-24 days per year." Outside of this period, the applicant would be subject to a call by Avista. DNRC also concluded that the applicant did not prove that Avista would not be adversely affected by diminished flows in the amount of the applicant's proposed diversion on the days where flows do not exceed 50,000 cfs. DNRC's decision was not appealed to district court.

[10]For a complete listing of closures created by statute, administrative action, and compact, see *Water Rights in Montana*, February 2006, pages 36-40.

[11]Draft Environmental Impact Statement, Upper Clark Fork Basin Water Reservation Applications, Montana DNRC, December 1988, page 1 -2,85-2-316(1) MCA.

[12]In 1987, Granite Conservation District and the Montana Department of Fish, Wildlife and Parks filed competing applications for reservations of surface water in the upper Clark Fork River basin. Processing these applications was suspended by basin closure established by 85-2-336. This same statute sets the priority date for these applications to be May 1, 1991. Pursuant to 85-20-1401, the United States Forest has applied for a reservation of the waters of Chicken Creek, a tributary to the West Fork of the Bitterroot River. Forest Service reservations must be for instream flow only.

Ground Water Appropriations

Montana first began to regulate ground water development in 1961 when the legislature passed a ground water code establishing a system for appropriation of ground water.[13] The 1973 Water Use Act required DNRC permits for ground water developments of 100 gallons per minute or more. In 1991, the legislature recognized the significance of ground water as a supply for Montana water users and passed the Montana Ground Water Assessment Act establishing the Montana Ground Water Assessment Program to characterize and monitor the state's ground water and conduct long-term, statewide monitoring of ground water quality and water levels.[14] Also in 1991, the legislature changed the definition of ground water developments exempt from DNRC water right permitting to 35 gallons per minute or less and 10 acre-feet per year or less.[15]

Federal Storage Reservoirs

Beginning in the 1930s and continuing through the 1970s, the federal government constructed several large dams and reservoirs in Montana. In order of construction, these included the Fort Peck, Hungry Horse, Canyon Ferry, Tiber, Yellowtail, and Libby Dams. The agencies charged with operating these dams, the United States Bureau of Reclamation (BOR) and the United States Army Corp of Engineers (COE) filed water rights with the state claiming the right to store water to market it to water users for various purposes.[16] In response to concerns about the marketing of Montana water for industrial purposes, especially for coal slurry pipelines, the 1983 Montana legislature created the Select Committee on Water Marketing (Committee). In response to recommendations from the Committee,[17] the 1985 legislature created a state water leasing program for the purposes of limiting the total amount of water that the state could lease and providing revenue to the state. The limit was 50,000 acre-feet. The Committee recommended and the legislature authorized the state to obtain water for any beneficial use from existing federal reservoirs, Fort Peck, Hungry Horse, Canyon Ferry, Tiber, and Yellowtail, provided that the state had an agreement between the state and federal government to share the revenue from marketing the water.[18] The state negotiated a contract with the COE for Fort Peck water, but did not market any of it. This contract expired in 1980s, and was not renewed.

In 2007, the Task Force successfully sought legislation to raise the cap from 50,000 to 1,000,000 acre-feet on the amount of water that the state can lease for beneficial uses when the source of the water is a federal reservoir and when the water leased is not used out of the basin in which the reservoir is located. The legislation also eliminated the requirement that water marketing

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[13]"Managing Montana's Water" at http://water.montana.edu/pdfs/headwaters/headwaters6.pdf, page 4. Prior to the effective date of the ground water code, January 1, 1962, ground water could be appropriated only if it flowed in a "permanent, defined, and known channel." See Doney, *Montana Law Handbook*, published by the State Bar of Montana, October 1981, page 13-14 and 18-19.

[14]http://www.mbmg.mtech.edu/grw/grwassessmemt.asp.

[15]Montana Session Laws Sec. 4, Ch. 805, L. 1991.

[16]COE constructed and operates Fort Peck and Libby Dams, and BOR constructed and operates Hungry Horse, Canyon Ferry, Tiber, and Yellowtail Dams.

[17]*Summary of the Report of the Select Committee on Water Marketing to the 49th Legislature*, January 1985.

[18]85-2-141(3) MCA.

revenue be shared between the state and federal government. The Task Force sought this legislation to use Hungry Horse water to provide for future water uses in the Clark Fork River basin and to protect uses of water in the basin that are junior to lower basin hydroelectric water rights.[19]

Challenges Facing the Prior Appropriation System

Administrative and Enforcement Challenges

Article IX, Section 3(3) states, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." However, the authority of DNRC, the agency assigned with the task of providing for the administration, control, and regulation of water rights, is limited. In his article entitled "Diversion, Ditches, and District Courts" published in *Montana the Magazine of Western History*, Brian Shovers wrote that Montana irrigators historically "... preferred the uncertainty and cost of litigation to established limits imposed by a centralized system." Rather than DNRC, the responsibility for adjudicating and enforcing water rights and resolving water disputes has been "...entrusted to ditch riders, water masters, and district court judges."[20]

In the adjudication process, DNRC's role is limited to examining water rights claims, and placing remarks identifying problems on them. DNRC does not act as an institutional objector, an entity assigned with examining all claims and filing objections to errant claims. Individual water right holders in a given decree bear this burden. In a policy paper discussing the implications of completing the state-wide water rights adjudication, the Upper Clark Fork River Basin Steering Committee wrote, "In larger basins with thousands and in some instances tens of thousands of water rights claims, individual water users cannot be expected to have the knowledge, willingness, and financial resources necessary to scrutinize every claim and to pursue more than a few objections."[21] Ameliorating this concern somewhat is the fact that claims with DNRC issue remarks to which no objections are filed by individual water right holders must be heard before the Water Court. DNRC staff must appear and explain their remarks. The Montana Water Court must address DNRC issue remarks prior to the issuance of final decrees.[22]

DNRC is not the state's water cop. It plays a limited role in enforcing pre-1973 water rights. Since the passage of the 1973 Water Use Act, it can seek to enforce water right permits by filing actions in district court. However, because of staffing and funding limitations, DNRC has almost never used its authority to go to court.

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[19]*Clark Fork Basin Watershed Management Plan,* Chapter 6, Hydropower Water Rights and Basin Water Use, pages 73-78, September 2004.

[20]Shovers, "Diversions, Ditches, and District Courts," *Montana - The Magazine of Western History*, Spring 2005, page 14.

[21]"White Paper on the Montana Water Rights Adjudication" issued by the Upper Clark Fork River Basin Steering Committee on March 2, 2004, pages 5-6.

[22]*Water Rights in Montana*, page 12-13.

The enforcement burden falls almost entirely on individual water right holders. Individuals can make calls on junior users and file lawsuits in district court to enforce their water rights. Water users within an enforceable water rights decree can petition district court to appoint a water commissioner to act as the court's agent and allocate the available supply of water according to the decree water right priority dates. The cost of the water commissioner is borne only by those water users receiving water pursuant to the commissioner's action rather than by all those subject to the decree. Water commissioners generally work only during the irrigation season and are not provided benefits such as health insurance, sick leave, or worker's compensation insurance. While the existing water commissioner mechanism has worked in some areas, in others, finding someone willing to serve as a commissioner has already been a challenge. As local water right decrees are integrated in the adjudication process, enforcing decrees will become more challenging and may involve a hierarchy of commissioners.

DNRC's administrative permit process for obtaining and changing water rights also places a substantial time and cost burden on water users. As is the case with the adjudication process, individual water rights holders have the right to object to permit applications for new or changed uses. Because these objections are heard in a contested case procedure, participants generally choose to be represented by legal counsel. DNRC has estimated that the average time for processing a water right permit application is 245 days. If an objection is filed to it, processing takes more time.[23]

Because of Montana's reliance on the judicial system and contested case administrative processes, the burden on individual water users to adjudicate, enforce, protect, and make changes to existing rights can literally take years and tens of thousands of dollars. This burden is increasingly problematic for traditional water users such as farmers and ranchers.

Water administration and management has generally followed a more centralized approach in the other western states than has been the case in Montana.[24] An example of the centralized model is Wyoming. Article 8, Section 2 of Wyoming's 1889 constitution provides:

> There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state.[25]

Granting DNRC more authority to administer and enforce water rights could reduce the burden on individual water users. DNRC could be directly authorized to investigate and enforce existing water rights and resolve disputes. It could, for example, hire, train, and provide technical and administrative support to water commissions who would enforce water rights decrees. Given clear criteria for doing so, DNRC could also play a more authoritative role in

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[23]Permit processing time was reported by John Tubbs to the Water Policy Interim Committee meeting on April 29, 2008.

[24]Shovers, pages 6-7. Also, see "How Will Completion of the Adjudication Affect Water Management in Montana?" prepared by the Upper Clark Fork River Basin Steering Committee, February 2006, pages 6-9. This paper is available at http://dnrc.mt.gov/wrd/water_mgmt/clarkfork_steeringcomm/completionof_adjud_rpt.pdf.

[25]A copy of the Wyoming Constitution is available at http://soswy.state.wy.us/informat/05Const.pdf.

administration processes reducing the role of objections to expedite decisions. Individuals could be allowed to appeal DNRC decisions to district court.

These changes to create a more centralized water right process would require legislation to increase DNRC's authority, staffing and budget. They would also require a greater willingness on the part of individual water right holders to trust and accept a more assertive and intrusive DNRC. Maintaining the existing system based on local control with its burden on individual responsibility may come at the cost of an effective loss of water rights by those for whom the time and expense of hiring attorneys and pursuing court action is increasing unaffordable.

The State of Idaho provides somewhat of a middle ground between state and local control. Water users within local water districts elect water masters, who are charged with distributing water in the order of priority to those water users entitled to its use. The water district sets the level of compensation for water masters, who, once hired, become state employees.[26]

Another portion of the State Constitution may complicate water right enforcement. Article II, Section 3 states that Montanans' inalienable rights include, "...the right to a clean and healthful environment and the rights of pursuing life's basic necessities..." Although neither statute nor court rulings have done so, the clean and healthful environment provision might be construed to prevent DNRC from allocating or managing water in a manner detrimental to "a clean and healthful environment," irrespective of the prior appropriation doctrine. As will be discussed below, Article II, Section 3 may also affect appropriations of water for people's "basic necessities."

Groundwater and Surface Water Interactions

Another challenge to the first-in-time, first-in-use, prior appropriation system is the increased acknowledgment of ground and surface water interactions.

In a recent decision, Montana Trout Unlimited (TU) vs. DNRC, the Montana Supreme Court clarified the regulation of those interactions. The Court noted that Montana basin closure laws recognized the close relationship between surface and ground water, and defined ground water to mean "...water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water."[27] Because these statutes did not define "immediately or directly connected," DNRC interpreted this phrase to mean "...that a ground water development could not pull surface water directly from a stream or other source of surface water.[28] The Montana Supreme Court invalidated this interpretation in the Montana Trout Unlimited (TU) vs. DNRC case because it "...recognizes only immediate connections to surface flow caused by induced infiltration and ignores the less immediate, but no less direct, impact of the prestream capture of tributary groundwater."[29] This

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[26]*Webmaster Handbook,* Idaho Department of Water Resources, page 8. This publication is available at http://www.idwr.idaho.gov/water/districts/Water%20District%20Publications/watermaster_handbook.pdf.

[27]See 85-2-342(3) MCA, 2005. This language was included in the basin closure statutes for the Upper Missouri, Teton, Jefferson, Madison, Teton, and Upper Clark Fork River basin closures.

[28]Montana Supreme Court decision in Case Number 05-069, Trout Unlimited vs. DNRC, page 6, April 11, 2006.

[29]Ibid, page 19.

decision halted DNRC processing of water right permit applications in statutorily closed basins incorporating the "immediate and direct" definition of ground water.

In response to this Supreme Court decision, the 2007 legislature passed House Bill 831. HB 831 was entitled:

> "An act revising water laws in closed basins; defining terms in water use laws; amending requirements for an application to appropriate ground water in a closed basin; providing that certain applications to appropriate surface water are exempt from closed basin requirements; providing requirements for hydrogeologic assessments, mitigation plans, and aquifer recharge plans; providing minimum water quality standards for certain discharges of effluent; requiring that previously approved plans that were not located in the Clark Fork basin must meet certain criteria; requiring that data be submitted to the Bureau of Mines and Geology; providing for rulemaking; providing for a case study and requirements and a fee for participation in the case study; recognizing and confirming existing appropriation rights in certain instances; providing an appropriation; amending sections 85-2-102, 85-2-302, 85-2-311, 85-2-329, 85-2-330, 85-2-335, 85-2-336, 85-2-337, 85-2-340, 85-2-341, 85-2-342, 85-2-343, 85-2-344, 85-2-402, and 85-2-506, MCA; repealing section 85-2-337, MCA; directing the amendment of ARM 36.12.101 and 36.12.120; and providing an immediate effective date and applicability dates an applicability date."

This title befitted the complexity of the legislation's content. HB 831 required an applicant for a new well in a closed basin to provide a hydrologic assessment conducted by a hydrologist, qualified scientist, or qualified licensed professional engineer demonstrating whether the new appropriation would result in a net depletion of surface water. If a net depletion would result, the applicant must also assess whether it would result in an adverse effect on an existing water right. If an adverse effect is predicted, the applicant must file a plan for mitigating that impact. The bill also appropriated $500,000 to the Montana Bureau of Mines and Geology to conduct a case study to determine minimum standards and criteria for the hydrologic assessments.

Although the TU vs. DNRC decision and HB 831 apply strictly only to basins closed to most new surface water rights, the requirement to address prestream capture of tributary groundwater, i.e., the interception of ground water that would otherwise flow to a surface water body, and for mitigation plans may be applied to all ground water permitting. DNRC cannot issue a permit for a new water right or a change to an existing right without finding that the new or changed use would not adversely affect any existing right. Applying the adverse affects test to new ground water developments requires assessing prestream capture. Ground water applicants whose development would result in both prestream capture and an adverse effect will likely have the opportunity to offer plans to mitigate it.

DNRC's proposed rules for determining net depletions pursuant to HB 831 require an applicant to determine the "Propagation of draw down from a well or other groundwater diversion and rate, timing, and location of any resulting surface water depletion effects."[30] Timing is a key issue for managing and enforcing surface and ground water rights in a prior appropriation system. The

[30]DNRC, "Notice of Public Hearing On Proposed Amendment in the Matter of the Proposed Amendment of Arm 36.12.101, Definitions and Arm 36.12.120, Basin Closure Area Exceptions and Compliance," August 13, 2007, available at http://dnrc.mt.gov/About_Us/notices/august/36-22-12.pdf.

impacts of ground water development on surface flows may take place over months or years rather than immediately.[31] Although Montana's laws may not specifically provide for conjunctive management or enforcement of surface and ground water, neither do they preclude it. As ground water development continues, surface water holders may decide that protecting their rights requires enforcement of their priority dates against wells. Water rights calls on wells have occurred in Idaho to protect surface rights. Montana law allows junior users to defend against calls by seniors if the call would be futile, i.e., that the call would not result in water for use by the senior right holder.[32] How futile calls would be applied to ground water wells with a delayed impact on surface water is not known. DNRC has written, "Ground-water use is difficult to curtail to avoid impacts to surface water users during water shortages under a prior appropriations system."[33]

The complexity of ground water development and use and its interaction with surface water does not bode well for the strict application of the prior appropriation doctrine.

Adverse Affects Test

The nature of the test to determine whether an adverse affect has occurred has become controversial. Before DNRC issues a permit to appropriate water or to change an existing water right, it must find that no existing right would be adversely affected. In his March 30, 2006 Proposal for Decision in the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company, a DNRC Hearing Examiner, wrote, " Adverse affect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of water will be controlled so the water rights of a prior appropriator will be satisfied." DNRC evaluates the adverse affect test on a calculated rather than a measured basis, i.e., an adverse effect need not be measurable. For example, measuring the impact of a small upstream diversion on a hydropower generator's use of water to produce electricity may not be possible. Measuring devices are generally accurate only to within 5-10% of the flow. However, as long as the hydropower water right holder can show a calculable impact of the diversion, an adverse effect would exist. The impact of ground water withdrawals on surface water is also generally calculated rather than measured. An attempt was made unsuccessfully in the 2007 legislature to overturn DNRC's calculated rather than measured interpretation by defining adverse effect quantitatively such as a percentage reduction in water supply to a senior user.

Domestic Water Supply

As previously noted, Article II, Section 3 of the Montana Constitution recognizes the right to pursue "life's basic necessities" as one of Montanans' inalienable rights. Some may argue that because water is a basic necessity, Montana water law should give domestic use priority. All other states subject to the prior appropriation doctrine except Washington provide such a priority to some extent in either their constitution or by statute.[34] In Montana, with two exceptions,

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[31]Kendy, E. and J.D. Bredehoeft, 2006, "Transient effects of groundwater pumping and surface-water irrigation returns on stream flow," *Water Resources Research*, V. 42.

[32]*Clark Fork Basin Watershed Management Plan,* Chapter 4, Legal Framework for Water Management, page 66, September 2004.

[33]DNRC unpublished paper provided to the Water Policy Interim Committee for its January 15-16, 2008 meeting.

[34]Arizona and California apply prior appropriation to surface water, but not ground water. Colorado exempts small

priority of water use depends only on the date on which water was first put to a beneficial use or on which a permit was acquired. One exception applies within a controlled ground water area. In such an a area, "...preferences can be imposed on existing rights to withdraw ground water, with domestic and livestock uses having first preference."[35] The other exception is a priority of water reservations in the Yellowstone River basin over certain water permits.[36] Cities and towns have the right to condemn water rights to provide a water supply for municipal and domestic water systems.[37] Individuals cannot. Condemnation requires "just compensation" to those whose rights are taken.[38]

Some western states have incorporated the "growing communities doctrine" into their statutes. Under this doctrine, a city or town maintains the right to more water than it is actually using so that it can meet the expanding domestic water needs of growing populations. This doctrine appears to contradict the prior appropriation doctrine because municipal water rights would not be limited to historic beneficial use and would not be subject to abandonment for nonuse. DNRC has written that neither the Montana Water Use Act nor Montana case law provides for this doctrine.[39]

One aspect of current Montana water law has had a large impact on the way people develop water for domestic use. As previously mentioned, since passage of the 1973 Water Use Act,

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wells outside of designated ground water basins from water rights administration under the priority system. In designated ground water basins, in-house uses are exempt, while outdoor lawn watering, etc., is not. See Division of Water Resources, Colorado Department of Natural Resources, Guide to Colorado Well Permits, Water Rights, and Water Administration, January, 2008, pg. 2. Article XV, Sec. 3, Constitution of the State of Idaho states "...priority of appropriation shall give the better right as between those using water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to the limitations as may be prescribed by law) have the preference over those claiming for any other purpose..." This provision applies to all water including ground water. In Nevada, the only ground water rights that are subject to curtailment are those that are in "designated ground water basins," and even in those basins, domestic uses are exempt. See Nevada Revised Statutes Sec. 534.180. With the exception of two specially designated domestic well management areas, domestic wells in New Mexico are generally not subject to curtailment. See 72-12-1.1 New Mexico Statutes Annotated and 19.27.5.14 New Mexico Administrative Code (adopted in 2006). Section 536.310(12) of Oregon's statutes provides "When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire them, preference shall be given to human consumption purposes over all other purposes and for livestock consumption over any other use..." Section 83-3-21 of the Utah Code states "...[1]n times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes..." Wyoming Statutes provide in Section 41-3-102(b) that "Preferred water uses shall have preference rights in the following order: (i) water for drinking purposes for both man and beast; (ii) water for municipal purposes..."

[35]Doney, *Ibid*, page 3485-2-507(4)(c) MCA.

[36]85-2-603(2) provides, "A reservation established before an application for permit is granted is a preferred use over the right to appropriate water pursuant to the permit, and the permit, if granted, must be issued subject to that preferred use."

[37]Doney, *Ibid*, page 33.

[38]70-31-301 MCA.

[39]See the January 31, 2008 letter from DNRC Regional Manager Bill Schultz to Stephen R. Brown, Garlington, Lohn & Robinson.

certain ground water developments have been exempt from DNRC permit requirements. Current law provides that:

> Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons a minute (gpm) or less, not to exceed 10 acre-feet a year (ac-ft/yr), except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit.[40]

To obtain a water right for a beneficial use of ground water subject to this exemption, the developer need only file a notice of completion with DNRC within 60 days of completing the well or developed spring.[41]

This exemption, together with DNRC's interpretation of "combined appropriation," has influenced how subdivisions have been developed in Montana, particularly in the fastest growing areas in the western portion the state. DNRC rules provide that a combined appropriation means, "...an appropriation of water from the same source aquifer by two or more groundwater developments, that are *physically manifold into the same system.*"[42] (Emphasis added.) This definition and the exemption allows a subdivision developer to avoid the time and expense of obtaining DNRC permits before water can be developed and used.[43] Instead of providing the subdivision with a community water supply and system, the developer can sell lots and leave each purchaser to dig an individual well. Over the last five years, 80% of the lots approved by DEQ had exempt wells rather than community water systems.[44]

Between July 1, 1973 and September 1, 2007, DNRC issued 104,142 certificates of water rights for exempt ground water developments. Seventy-five percent of all of the 104,142 certificates listed domestic use as a purpose of use.[45] DNRC estimates that by the end of 2007, it will have issued about 40,000 certificates for exempt wells using the 35 gpm/10 ac-ft/yr definition that came into effect in 1991. Over half of the 40,000 will have been issued in Gallatin, Lewis and Clark, Missoula, Ravalli, and Flathead Counties, and over 80% will have been issued in just 14 counties, only 3 of which are outside of western Montana.[46] DNRC estimates that if the current ground water permit exemption remains in effect, somewhere between 32,000 and 78,000 additional certificates for exempt wells will be issued by January 1, 2020.

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[40]85-2-306(3)(a) MCA.

[41]85-2-306(3)(b) MCA.

[42]36.12.101(14) ARM.

[43]*Water Rights in Montana*, page 18 and 17.38.202(5) ARM.

[44]Private communication from Curt Martin, December 19, 2007. This information was provided by the DEQ Subdivision Bureau to the Water Policy Interim Committee on October 24, 2007.

[45]"Wells Exempt from the Permitting Process", presentation by Curt Martin to the Water Policy Interim Committee on the September 13, 2007.

[46]The 14 counties are Ravalli, Flathead, Gallatin, Lewis and Clark, Missoula, Yellowstone, Lincoln, Madison, Park, Lake, Jefferson, Carbon, Cascade, and Sanders.

While an individual 35 gpm/10 ac-ft/yr ground water development may have a negligible impact on an aquifer and surface water connected to it, the impact of multiple exempt wells may be significant. As written above, before DNRC issues a permit to appropriate water or to change an existing water right, it must determine whether any existing right would be adversely affected.[46] Existing right holders have the opportunity to object to a permit application to protect their rights. However, because they do not require DNRC permits, exempt ground water users avoid these tests. DNRC has noted that new exempt wells are not subject to the provisions of HB 831 which were designed to ensure that ground water pumping does not adversely affect senior surface water right users.[47] Senior water rights holders can make call on junior exempt wells. However, the delayed impact of ground water withdrawals on surface water may make calls problematic and ~~be~~ expensive to prove in court.

Another important source for local domestic water supplies is irrigation which charges local aquifers. In Montana, two changes are occurring that may threaten this source. First, irrigated lands are being sold and converted to other land uses. Second, flood irrigation has been converted to sprinklers to better match water application to crop needs. Both changes reduce the flow of water to the aquifer and may, therefore, reduce the amount of water available for domestic wells depending on local conditions. The eastside benches in the Bitterroot Valley below the Bitterroot Irrigation District ditches, Daly ditches, and the Supply ditch and areas west of Billings are examples of areas in which reductions in irrigated agriculture are adversely affecting domestic wells. Current law does not provide tools for domestic ground water users to protect against such changes.

Domestic water use inside a house is for the most part non-consumptive. Use outside the home is more consumptive. Depending on the method of waste water treatment, individual septic system or sewage treatment plant, in-house domestic use may recharge the local aquifer or be discharged to surface water.

The demand for water for domestic use will continue to increase. In portions of western Montana, water use by people for their homes, lawns, and gardens may be the predominant new use. Ground water permit exemptions do not create a domestic use priority. They are, however, providing an incentive resulting in development of individual wells rather than community public water supply systems. Large scale increases in individual wells are likely to further complicate water allocation under the "first-in-time, first-in-use" system.

Federal Constraints

The 1952 McCarran Amendment subjected federal water rights to state general water right adjudications and administration.[48] However, water use in Montana is subject not only to state water law, but also to federal statutes, regulations and licenses. Several Montana rivers host dams and reservoirs constructed by the federal government as well as private parties such as investor-owned utilities. The operation of dams and reservoirs and the river flows that they support are affected by laws such as the Endangered Species Act (ESA), the Clean Water Act, and Flood Control Acts, by licenses issued by the Federal Energy Regulatory Commissions, by

[47] Unpublished DNRC paper entitled "Effects of Exempt Wells on Existing Water Rights" provided to the Water Policy Interim Committee at is January 15-16, 2008 meeting.

[48] 66 Stat. 560, 43 U.S.C. § 666.

federal treaties, and by contracts among utilities.[49] These constraints are outside of the state water right framework and, in theory, do not conflict with water rights. However, by requiring reservoir drawdowns, spill at dams, and flow augmentation measures, these requirements affect the physical and/or legal availability of water. Because of the Supremacy Clause of the United States Constitution, conflicts between implementation of federal statutes and state law may be resolved in favor of federal obligations.

The operation of Hungry Horse and Libby dams in the Clark Fork River and Kootenai River basins are illustrative. Both are subject to requirements resulting from the listing of anadromous fish stocks downstream in the Columbia Basin. As a result of litigation, a United States District Judge has rejected the 2000 and 2004 biological opinions for the Federal Columbia River Power System written by the National Marine Fisheries Service (NMFS) to satisfy the legal requirements of the ESA. In the absence of an acceptable biological opinion, this judge has adopted specific requirements for the operation of the Columbia River dams, including Hungry Horse and Libby, addressing reservoir drawdowns, spill, and flow augmentation. The judge has recently written that should NMFS fail again to produce an acceptable biological opinion, he may issue a "...permanent injunction directing the Federal Defendants to implement additional spill and flow augmentation measures, to obtain additional water from the upper Snake and Columbia River, or to implement reservoir drawdowns to enhance in-river flows."[50] Because the Libby and Hungry Horse reservoirs are two of the four largest storage reservoirs in the Columbia River basin, these spill, flow, and drawdown measures may limit the water available from them for use by Montana water users. The Montana Department of Fish, Wildlife and Parks has proposed a draw down limit to benefit bull trout in Hungry Horse reservoir that has been included in the Columbia River Basin Fish and Wildlife Program adopted by the Northwest Power and Conservation Council and in the recently released NOAA Fisheries Federal Columbia River Power System Biological Opinion.[51] ESA and other constraints also affect the operation of federal resources east of the Continental Divide in the Missouri River basin.

Summary

Montana water law is governed by the doctrine of prior appropriation, first-in-time, first-in-use. As this paper has shown, the lack of institutional capabilities and resources and growing demands for a limited resource are eroding the effect of this doctrine. The era in which new and expanded water uses are provided via new surface water rights is essentially over. The growing development of ground water and recent court rulings and legislation increases both the importance and complexity of managing ground and surface water interactions. Unlike other

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[49]For specific examples of such constraints applicable to the Clark Fork River Basin, see *Clark Fork Basin Watershed Management Plan,* Chapter 5, Legal and Regulatory Constraints to Water Management, pages 68-72, September 2004.

[50]James A. Redden, United States District Judge, District of Oregon, memorandum to Counsel of Record in Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., CV 01-640 RE, and American Rivers v. NOAA Fisheries, CV 04-00061 RE, December 7, 2007.

[51]See 2003 Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program, Columbia River Basin Fish and Wildlife Program, Portland, Oregon, 2003, available at http://www.nwcouncil.org/library/2003/2003-11.pdf.; and the NOAA Fisheries Federal Columbia River Power System Biological Opinion, May 5, 2008 page 6, available at https://pcts.nmfs.noaa.gov/pls/pcts-pub/sxn7.pcts_upload.download?p_file=F21451/200505883_FCRPS%20Ch9-Appendix.pdf.

prior appropriation states, Montana does not provide a general priority for domestic water uses. The ground water permit exemption and DNRC's interpretation of combined appropriations of ground water has increased reliance on individual wells for domestic water supply. The burden measured in time and dollars on individual water right holders to define, enforce, protect, and/or change water rights threatens the viability of the rights themselves. A right that cannot be defined, enforced, protected, and/or changed, has little or no value. In addition, federal laws, regulations and licenses increasingly constrain water management and use outside the framework of state water law.

To: All members of WPIC committee

Montana needs a water resources report!!! The enormous amount of surface and ground water leaving the State must be published if we are to have an honest discussion on water policy.

REPORT MADE EASY:

1. All water in our streambeds are monitored through out the State and stream flows are reported.

2. Groundwater can be determined by review of thousands of public well log reports.

3. The report should also include, when needed , ways of capturing our water for the benefit of Montana. Don't let it escape through N. Dakota and Idaho.

4. Our water should be advertised as a valuable resource element available to promote economic growth in Montana and quality of life. Stop the no water scare tactics.

A WATER RESOURCE REPORT MAY REVEAL:

1. We have more irrigation then any State in the union.

2. We ship out (14 Trillion Gallons) of water a year (net). A huge water gift.

3. Montana is a water rich State. We use less than 2% of our water.

4. Domestic wells use less through .01% of our water supply.

5. Hydroelectric appropriations do not consume water (just in stream use). In stream use it does not create shortage.

6. 2,500,000 cows equal to 25,000,000 people are not effecting water supply.

7. Irrigation and permitted uses today in Montana have a miniscule effect on our State water supply. Evaporation is the biggest use.

Published by Clayton Fiscus, Chairman, K.O.W. (Keep Our Water) @1111 Main Street, Suite # 11, Billings, Montana 59105. (406)252-6400.

9. Senior water rights are not threatened by Montana water users.

10. We have huge water storage behind dams. (Produce storage numbers).

11. We have flood control issues every year. (Indicating water leaving the State).

12. For thousand of years all water in Montana has been replaced each year through massive hydrologic weather cycles and mountain snowfall.

Etc. etc, this list can go on for another 10 pages. Another fact example: 95% of Montana water is underground unseen and barely used.

Comes now Montana WPIC Legislation to protect Montana rights for our citizens.
1. Abolish closed basins in Montana.
2. Stop the punitive permit process.
3. Use Montana water resource report as the Club for growth.

We've got water - Lets Use It - Don't lose it downstream.

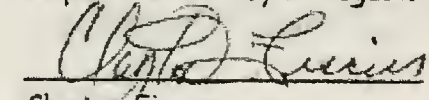
Example: (A) Butte my home County, in South Dakota has running water to farmers sheep and cattle pens provided by one well in Nisland, South Dakota. (They don't have Montanas huge water supply).

When needed build more Storage. Advertise our water as an economic growth benefit Montana has got more water than we will ever use in 200 years. Equal to our supply of coal supply. Our water is renewable our coal is not.

Billings should be included as the public hearing WPIC site for Eastern Montana.

Thanks for your attention.

Hope I can testify in August. Getting time off from Billings is hard.



Clayton Fiscus
Chairman K.O.W. (Keep Our Water)
1111 Main Street
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Published by Clayton Fiscus, Chairman, K.O.W. (Keep Our Water) @1111 Main Street, Suite # 11, Billings, Montana 59105. (406)252-6400.

TO: Joe Kolman

FROM: Sarah Bond

RE: LS 5021 Draft legislation regarding water rights enforcement

DATE: July 29, 2008

As discussed during the telephone conference with the subcommittee, I met with some folks in the AG's office and DNRC about the logistics of the Attorney General's office performing work specific to water rights enforcement, and LC 5021.

1. The group expressed grave reservations about the provision in 85-2-122. "A person who violates or refuses or neglects to comply with the provisions of this chapter, any order of the department, or any rule of the department is guilty of a misdemeanor." It is thought that the lack of definition would likely doom any attempt to prosecute under this provision. For example, the section does not specify the requisite mental state, generally an essential element of any crime. Nor have the due process issues arising in criminal prosecutions been fully thought through. The suggestion is to eliminate 85-2-122(1) altogether, or, think those issues through and add the specificity required to proceed under the criminal statutes. The remainder of the penalty section provides for civil penalties, which seems appropriate.

2. It was suggested that if our office begins to help more in prosecutions, 85-2-122 should be amended to require that any fines collected as a result of one of our prosecutions be deposited into an AG water enforcement account for use in the prosecutions. A statutory appropriation would also be required for us to spend out of that account. This seems parallel to 85-2-122(3) (a) which establishes an account for collections from DNRC prosecutions and (3) b which requires the money collected from a county attorney action to be deposited into the county general fund.

3. It was noted that there is a model already for a statutory section that could establish an enforcement program here. Chapter 4 of Title 44 establishes miscellaneous functions of the department of justice. Among the other functions is a fish wildlife and parks enforcement program. 44-4-115 provides: "There is a fish, wildlife, and parks enforcement program in the department of justice, which must be administered by the entity in the department that assists county attorneys with prosecutions. The program staff may investigate and may prosecute criminal cases concerning the

violation of the laws administered by the department of fish, wildlife, and parks. The program is under the supervision and control of the attorney general and consists of a half-time attorney licensed to practice law in Montana who may prosecute, or assist county attorneys and the department in the prosecution of, criminal violations of Title 87." If the committee wants to ensure that there is a warm body here who can take on some enforcement cases without being pulled into other kinds of cases, this kind of mechanism could assure that at least one half-time person would be available to do the work. Presumably the program would be run by the water unit, because of the unique nature of water law.

4. I could not remember what the intent was behind the new subsection 5 in LC 5021. It provides that the department, county attorney, and AG shall give priority in enforcing this section, to protecting the water rights of a prior appropriator. The decision to prosecute is extremely complex, and our office must retain its prosecutorial discretion based on evidence and other issues specific to the cases. Legislative priorities are certainly appropriate but we were hoping this could be fleshed out a little more. Something more clearly expressive of legislative intent would be useful.

Please feel free to call if we can be of further assistance.

Montana
Association of REALTORS®

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TO: Water Policy Interim Committee, Sen. Elliott, Chair

FROM: Montana Association of Realtors

RE: Comments on Water Policy Interim Committee Draft legislation

DATE: September 8, 2008

The Water Policy Interim Committee ("WPIC") has recently made available a revised draft of LC 5020, as well as a new bill draft, LC 5022. The following comments are respectfully submitted on behalf of the Montana Association of REALTORS® ("MAR"). MAR may provide additional comments after further review or upon any additional revisions to the draft legislation. MAR appreciates the opportunity to comment on the draft legislation at this early stage.

I. LC 5020

As MAR advised in its earlier comments to WPIC on the initial draft of LC 5020, before undertaking significant revisions of a permit process that, up until the very recent past, has worked relatively well for both applicants and objectors, it is worthwhile to determine exactly what the source of the significant increase in the time, cost, and frustration required to process a permit application is. LC 5020 continues to provide no significant advantage in terms of the time to process a permit application, not does LC 5020 simplify the permit process for either applicants or objectors. Consequently, MAR seriously questions the benefit of or need for LC 5020.

The following is an outline of the process to obtain a decision from Montana Department of Natural Resources and Conservation ("DNRC") on an application for a new beneficial use permit or an authorization to change an existing water right under current statute.

1. Applicant submits an application to DNRC.
2. Within 180 days of receipt of application, DNRC must notify the applicant of any deficiencies in the application. Mont. Code Ann. § 85-2-302(5).
3. Within 90 days of the notice of deficiencies, the applicant must respond with information to make the application correct and complete. Mont. Code Ann. § 85-2-302(6).
4. Upon receipt of a correct and complete application, DNRC prepares public notice for service and publication as prescribed by law. Mont. Code Ann. § 85-2-307(1).
5. Objections must be filed with DNRC within the time period set forth in the public notice, which is no less than 15 days and no more than 60 days after publication of public notice. Mont. Code Ann. § 85-2-307(2).

6. If no objections are received, DNRC must grant, deny, or condition the application within 120 days of the last date of publication of public notice. If objections are received or a hearing is held, DNRC must grant, deny, or condition the application within 180 days of the last date of publication of public notice. Mont. Code Ann. § 85-2-310.

To summarize, the maximum amount of time allowed for processing an application under existing statute, from receipt to final decision, is 510 days if objections are received and 450 if no objections are received. The time for granting, denying, or conditioning an application after public notice may be extended, upon the agreement of the applicant or in extraordinary cases, but only for a maximum of 60 days.

In contrast, the following timeline sets out the procedure for application processing proposed under LC 5020.

1. The time period for deficiency notices and responses to the same remain unchanged. DNRC has 180 days from receipt of an application to notify the applicant in writing of any deficiencies, and the applicant has 90 days to make the application correct and complete. Mont. Code Ann. § 85-2-302(5) & (6).
2. DNRC can meet "informally" with the applicant to discuss the application and will make a written preliminary determination of whether to grant or deny the application. No time limit is set within which these informal discussion can take place and a written preliminary determination must be made. LC 5020, Sec. 2(1)(a).
3. If DNRC proposes to grant the application, public notice of the application and preliminary determination is prepared. Again, there is no time period after the preliminary determination within which public notice must be issued. LC 5020, Sec. 2(1)(b).
4. Objections must be filed with DNRC within the time period set forth in the public notice, which is no less than 15 days and no more than 60 days after publication of public notice. LC 5020, Sec. 2(2).
    a. If valid objections are received, DNRC will hold a show cause hearing. There is no deadline by which DNRC must hold a show cause hearing. LC 5020, Sec. 4(1).
    b. If objections are received and later unconditionally withdrawn or if no objections are received, DNRC shall grant the application, although there is no time period within which such grant must take place. LC 5020, Sec. 5(4).
    c. If objections are received and withdrawn pursuant to stipulated conditions, DNRC may grant the application subject to conditions "as necessary to satisfy applicable criteria." LC 5020, Sec. 5(5). There is no time period within which DNRC must take such action. Additionally, LC 5020, Sec. 5(5) leaves open the question of what other options are available to DNRC. Yes, DNRC may grant the application subject to conditions, but may it also grant the application unconditionally or now even change course and deny the application? This is unclear.
    d. Regardless of whether no objections are received or objections are received and a show cause hearing is held, DNRC will propose to deny or grant with or without conditions within 90 days after the close of the administrative record. LC 5020, Sec. 5(1).[1]

[1] One assumes that the proposal to grant or deny an application referred to in LC 5020, Sec. 5 is different from the preliminary written determination to grant or deny an application referred to in LC 5020, Sec. 2, as the bill draft is not

e. If DNRC proposes to deny the application, LC 5020, Sec.5(2) mandates that DNRC hold a show cause hearing in which the applicant must demonstrate by a preponderance of the evidence why the application should not be denied. It appears that this would be in addition to the hearing provided for in LC 5020, Sec. 4. Again, there is no time period within which this second hearing must take place, nor is there any deadline after the hearing within which DNRC must issue its final decision.

f. If DNRC proposes to grant the application following the first show cause hearing provided for in LC 5020, Sec. 4, the process for issuance of a final decision is not clear, nor is any timeline for the issuance of a final decision set forth.

5. If DNRC's preliminary determination is to deny the application, one assumes that LC 5020, Sec. 5(2) requires a show cause hearing. However, because LC 5020, Sec. 5 refers to a proposal to deny and not a preliminary determination, the procedure following a preliminary determination to deny is unclear. For example, LC 5020, Sec. 5(1) requires DNRC to propose to deny or propose to grant within 90 days after the close of the administrative record. If the preliminary determination is to deny, does the administrative record close after that preliminary determination and the 90 days starts to run from there? If that is the case, is the record re-opened for the show cause hearing required under LC 5020, Sec. 5(2)? Is it possible that the preliminary determination is to deny and then the proposal is to the grant the application? If so, is public notice then required and the application subject to objections? These are all unanswered questions.

Due to the significant lack of clarity and the number of open-ended timelines, it is impossible to determine what the maximum number of days allowed for processing an application under LC 5020 is. Additionally, as is demonstrated in the above outline, LC 5020 takes what has been a relatively straightforward process and introduces a large amount of uncertainty and lack of clarity.

In addition to simple lack of clarity or timelines, LC 5020's reliance on show cause hearings raises another concern. DNRC has been in the practice recently of issuing statements of opinion and then allowing the applicant a hearing to "show cause" why the statement of opinion should not be adopted with the presiding hearing examiner being the same DNRC employee who authored the statement of opinion. DNRC has analogized this practice to the situation of a judge who, in the matter of Party A vs. Party B, rules against Party B and then later presides over a case of Party B vs. Party C, in which case the judge's previous ruling against Party B in a separate case involving a different opposing party and different issues does not prevent the judge from presiding over a case involving Party B again. However, the more accurate analogy

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clear. Additionally, Sec. 5 raises at least the possibility that DNRC may issue a preliminary written determination to deny under Sec. 2, in which case no public notice would be required, but then propose to grant the permit under Sec. 5. In this case, what process will follow? Will the application then be sent out to public notice, subject to objections and a hearing? This is unknown in the current bill draft language. There is also an open question as to what constitutes the close of the administrative record where the preliminary written determination under Sec. 2 is to deny the application. Is the administrative record closed upon issuance of that preliminary written decision? One assumes that if the preliminary written determination under Sec. 2 is to grant the application and objections are received, the administrative record closes upon conclusion of the show cause hearing mandated under Sec. 5, but what if the preliminary written determination is to grant and no objections are received? Does the administrative record close upon close of the objection period? Although Sec. 5(4) requires DNRC to grant the application, the time period for such action is undefined. Finally, there is a substantial question as to what constitutes the administrative record in light of Sec. 2's allowance for "informal" discussions between DNRC and the applicant. Are these "informal" discussions and the information provided to DNRC during those discussions part of the record? This is also unclear.

is to a judge who presides over Party A vs. Party B and rules against Party B, with Party B's appeal of the decision being to the same judge. This is, of course, a situation that the justice system does not allow for because of the obvious denial of due process. DNRC's practice in show cause hearings raises the same concerns for due process, concerns that are not addressed but, rather, heightened, in LC 5020.

In short, LC 5020 provides no advantage in terms of expedited or simplified processing. If anything, it creates a much more convoluted system that is more expensive to all parties involved, including DNRC, as it creates the possibility of not one, but two different hearings. As the Montana Supreme Court noted in its recent decision in Lohmeier, *et al.* v. DNRC & Utility Solutions, LLC, DNRC argued to the Montana Supreme Court that as senior water right holders,

> Lohmeiers' rights were wholly and adequately protected under § 85-2-311(1)(b), MCA, which requires a new water right applicant to show by a preponderance of the evidence that "the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected." The DNRC further argues that §85-2-307(2), MCA, affords the Lohmeiers the opportunity to object to a new water right application and void objections before the DNRC.

Lohmeier, 2008 MT 307, ¶ 22 (Sept. 3, 2008). Given DNRC's advocacy before the Montana Supreme Court that the existing statutes for processing applications provide sufficient protections to senior water rights holders and ample opportunity to object, it begs the question as to the need for the sweeping, confusing, and ultimately more costly and time-consuming proposal of LC 5020.

II. LC 5022

As MAR has urged before, science should drive legislation. Rather than being based on science, LC 5022 is based upon an impromptu response from an independent Three Forks area developer who, to the best of MAR's knowledge is not a member of MAR or the Montana Building Industry Association. Although 30 or more lots with an average lot size of under five acres may be the estimated break-even point for an individual developer, to blanketly apply that standard to all development across Montana is unwarranted and unsupported. Additionally, as MAR has stated before, the data presented to WPIC during this interim has consistently demonstrated that exempt wells constitute a minority of groundwater consumption in Montana, particularly when compared with agricultural irrigation, and that groundwater is available even within closed basins to provide adequate supply for existing and projected new uses. This lack of supporting science is further emphasized by the fact that LC 5022 does not require local governments to comply with Mont. Code Ann. § 76-3-511 prior to adopting public system requirements. Rather, by amending Mont. Code Ann. § 76-3-504 to require public water and sewer systems for all subdivisions of 30 or more lots with an average lot size under five acres and to mandate that subdivision regulations so require public systems, LC 5022 raises questions as to loss of local control.

A developer could propose an alternative to a public system for acceptance by the local governing body as part of preliminary plat approval under Mont. Code Ann. § 76-3-622, but such a proposal would have to include information showing by a preponderance of the evidence that the proposed alternative protects public health and the environment, can mitigate harm to public health and the environment, and is achievable under current technology. Such information would have to be supported by peer-reviewed scientific studies. Additionally, the proposal would have to include a comparison of costs between a public system and the proposed alternative. In

short, LC 5022 shifts the burden that a local government must currently meet before requiring a public system to a developer who wants to choose to not use a public system and significantly increases that burden.

From: Corlene Martin [corlene@3rivers.net]
Sent: Monday, August 11, 2008 12:05 PM
To: Kolman, Joe
Subject: water

Joe,

I hope I'm not too late but I just found the editorial from the Great Falls tribune with your address. I'll make it quick.

As a City of Choteau council member (and on behalf of the mayor and full council) we think a top priority of the next legislative session should be to increase funding for cities to upgrade their public water and sewer systems. Our situation is probably not unique, but we struggle to pay for the maintenance of our current system. At the same time we are faced with the cost of financing upgrades to adequately serve our community.

Here's an example: because the Teton River has been chronically dewatered (through the ravages of drought and questionable irrigation practices) our old lagoon will more than likely be replaced with a sewage treatment facility. It will cost more than we can pay for…without (lots) of help.

Since the committee is meeting tomorrow, we'll leave it at one suggestion.

Thank you,

Corlene Martin

City of Choteau Council Memeber

PO Box 215

Choteau, MT 59422

406 466.5784

corlene@3rivers.net

Kolman, Joe

From: Geneva McClain [gmcclain@HQ.SportsInc.com]
Sent: Monday, July 07, 2008 12:06 PM
To: Kolman, Joe
Subject: Water

To Whom It May Concern:

There is a great tragedy at Fort Peck Lake. The barge traffic on the Missouri River continues to draw down our water with their requirement for the 200 feet wide 9 feet deep channel.

Montana provides 75% of the water for the Missouri River but we have never received our fair share.

I hop that you will give this strong consideration.

Don Pfau
Fort Peck Advisory Committee
P O Box 780
Lewistown, MT 59457
Phone: 406-366-2422

From: Jim Paugh [jimpaugh@mtintouch.net]
Sent: Sunday, August 10, 2008 8:41 PM
To: Kolman, Joe
Subject: Water

Joe Kolman, Legislative Environmental Policy Office

P.O. Box 201704

Helena, MT 59620-1704

Reference: Water

Dear Sir:

Included with these comments is a letter I wrote as addressed and dated. Since that time it is my understanding that the $20.00 tax has been cancelled, but the State of Montana is not making a refund to those who did pay the tax. So now the State of Montana has a list of 50,000 or 60,000 claims for water that have not paid the tax and so the State of Montana will be able to cancel them.

According to an editorial in the July 6, 2008, Great Falls Tribune, among others is the statement, draft recommendations are: "streamlining and simplifying the process for issuing new water permits;" This is the last thing we need. If subdivisions need water, they are welcome to buy them The idea that there is extra water in Montana is ridiculous.

If the objective of legislation is to see that Montana agriculture is to keep their water that the Constitution "recognizes and confirms", the DNRC will have to be required to cancel any permit that they have granted and it will have to be enforced or be canceled if it interferes with any existing water rights, at the expense to the DNRC.

The existing policy of the DNRC having granted permits and leaving agriculture to pay the cost of retaining their rights has left agriculture with the task of going to court against people with plenty of money and a willingness to hire lawyers to get their way. Hence money buys the water. Agriculture must always be paying court costs for a water right that really makes very little profit.

The DNRC must pay for the mess they have created by granting water permits willy-nilly all over the state, but mostly in the irrigated mountain valleys.

There is a saying that I do not remember but will paraphrase: "Bureaucracies are established by governments to do the governments work, after they have been established, they take on a cloak of their own and soon regard those they were designed to work with, as their enemies." From my point of view the DNRC is an example of that.

If you would like me to come to any of your meetings, please feel free to contact me.

Sincerely,

A letter with my signature will follow.

James T. Paugh

10967 Lowe r Denton Rd.

Coffee Creek, MT 59424 Phone 566- 2255

HC 76, Box 50

Coffee Creek, MT 59424

March 25, 2007

Ms. Tami Jo Blake, Editor

Agri-News

P.O. Box 30755

Billings MT 59107

Dear Editor:

I have read the "letter to the Editor" in the March 9, 2007 issue of your paper concerning Fidelity Exploration & Production Company and the Montana Department of Natural Resources & Conservation. This concerns water pumped with methane gas production, and was written by Irv Anderson from Birney, Montana.

From my point of view, the letter concerns water taken from the ground in vast amounts, and it is to be sold, some of it out of state. The inference I get from Mr. Anderson's letter, the DNRC is assisting the methane gas producers in getting their application for a water permit prepared properly. I do not believe the DNRC should be involved in assisting in the attempted taking of water from prior water right users. The Montana Constitution, Article IX, Section 3. Part 1 says: "All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." When the DNRC issues a permit, it should not revise an existing water right. The DNRC should be strictly held accountable to support our Constitution. (The existing water right owners)

I used to live in the Gallatin Valley on an irrigated farm. Sub dividers were moving closer with each passing year. In about 1995 there was an attempt to take one of my water rights by a sub divider, and it went to a DNRC hearing. As I was going up the steps to the hearing with my attorney, he told me that the DNRC had never seen an application for a water permit that they did not like. I spent $6000.00 for nothing. After watching several other permits granted, I finally sold out last year and moved to Central Montana with no surface water to fight about.

About the year 2000 I was trying to keep my water and was granted some time on the program at a meeting of an interim Legislative committee regarding water. In my report in discussing the problems I had with the DNRC, I stated that it seemed to me that the Legislature for the last 20 years or so had done everything it could to destroy irrigated agriculture in Montana. I still feel this is the objective of many in Montana government.

In late 2003 or early 2004 I went to a water meeting in Bozeman. Present were representatives of the DNRC and the Water Court (an unholy alliance), and several Legislators. The program was to sell the water tax. The Legislature passed it. This tax was $20.00 for each water right. It was an insignificant amount, hardly more than it cost to send the bills and collect money.

It is my opinion, (certainly a minority), that the only purpose for the tax was to reduce the number of water rights. If the tax was not paid, the bill is to be turned over to the Department of Revenue for collection and penalties. If the DNRC lost a record or did not transfer a water right or lost an address of a water right (they lose many of these all of time), the fines and penalties will rise and in ten years they will have lost many thousands of records and many water rights cancelled. Prior to this water rights tax, the only way the DNRC could get a water right abandoned was to prove that the water had not been used for 10 years when the water was available. This would be very difficult It is easier to tax the water right, and cancel it when the tax was not paid.

The taking of water from ranchers through methane gas development is just a continuation of the plan. So, it seems to me that the Montana DNRC (the administration), the Water Court under the Supreme Court, (the Judicial) and the Legislature, all of Montana's government is hell bent on TAKING agriculture water rights from the constitutional rightful owners

So much for whining, for things to improve, a suggested change is necessary. That follows.

The DNRC must take total responsibility for all permits granted. If the DNRC grants a permit for water and it interferes with a water right (pre 1973), when notified of the infringement, the DNRC must immediately check and if the infringement is factual, they must require the permit holder to cease using his water. This must be done within 24 hours. If it can not be determined that the infringement is factual in 24 hours, the DNRC must require the permit holder to cease using the water until it is determined what the facts are in the case. In any case the DNRC must be liable for any and all damages that result from the taking of a water right by any permit holder using that permit as his authority for using the water.

If a party takes water without a permit, (for a pond for instance), The DNRC must notify the party taking the water that they will have to release the water within 24 hours or there will be a penalty assessed of $900.00 per day. I believe this is in the statutes now. The penalty must be assessed and paid. If not paid, a continuing assessment must be added as a lien against the property, and can not be reduced by any Court. The DNRC must be liable for any and all damages from the taking of a water right by a party even though they do not have a permit.

I do not have first hand knowledge of Methane water pumping, but it would seem to me the same should follow. If a party is pumping water and water user prior to 1973 is deprived of water (a spring goes dry for instance), the pumping party would have to halt the activity immediately until it could prove beyond any doubt, that their activity was not responsible, that pumping would have to halt. If proof was not possible the pumping party would have to cease for 10 years and if the spring started running again they would be all through. The DNRC would again be responsible and liable for any damages including watering the stock until the spring came back on.

The conclusion I would make is: The DNRC could not possibly pay for all of the damage claims against them, then the DNRC would have to terminate many of the permits they have issued. This would be proof that that they should not have approved them in the first place.

I see no reason why the DNRC should be allowed to take water all around the state in violation of both the Constitution and the statutes. As I see it we are rapidly moving towards anarchy with the right to use water in Montana. We should remember that anarchy is not stable and if is not controlled by fair and honest government, society will degenerate from the present situation where the party with the most money wins to a situation where the party with most firepower wins.

Jim Paugh

Coffee Creek, MT

WPIC bill drafts--comments, suggestionsFrom: JP Pomnichowski [pomnicho@montanadsl.net]
Sent: Monday, August 04, 2008 3:09 PM
To: Kolman, Joe
Subject: WPIC bill drafts--comments, suggestions

Hello, Mr. Kolman,

Here are my questions and suggestions for the WPIC bill drafts. Sorry not to have gotten this to you with my first email. Some of these are questions for you, most are recommendations or questions or considerations for the committee.

BILL DRAFTS

LC5007

Perhaps add, in Section 1(2). The groundwater assessment steering committee…shall prioritize subbasins for investigation based upon…housing, and commercial activity, and adjudication.

Comments from Water Court may help to determine if this would help or hinder the groundwater assessment steering committee.

LC5019

p2, In Section 1(3)(d), I assume this includes irrigation wells for public open space and parkland. The item says that exempt wells will not be allowed in the public water system; that should include irrigation wells. Water needed for fire service, public space watering, etc. should be on the system. (For fire, it must be so as to have sufficient pressure.)

In Section 1(3)(e), perhaps add the DNRC or DEQ for water quality testing and monitoring, unless the MBMG will do that, too.

In Section 1(4), was there discussion among the WPIC to change 'may' to 'must'? "Wells permitted pursuant to this section may must be included in the ground water monitoring program…"

p6, In Section 2(11) is a definition for "developed spring". Does that definition apply to fish ponds, or to opencut mining operations ("wet pits")? Just curious.

In Section 2(12)(g), do you mean acres of land or acre feet of water? "Domestic purposes means those water uses common to a household including: (g) garden and landscaping irrigation to ??? acres.

p8, In Section 2(23), change two to one: "…water from the same source aquifer by two one or more wells…"

and for amounts, consider this: "…that is estimated to supply at least ???? 4.5 acre feet of water per year. (1 house and ¼ acre = .73 acre feet) and not more than 3,000 1,000 acre feet per year based on availability of water in the basin. (Subject to legislative approval…"

I calculate these amounts like this: minor subdivision is 5 lots or fewer, any other subdiv is 6 or more; so .75 x 6 = 4.5 acre feet/year. This is the minimum. For a 150 home subdivision at .75 acre feet/home, that's 225 acre feet/year. (Are you figuring what's needed for sewage treatment? If not, I'd estimate 775 af/y for 1,000 af/y) It'd be worthwhile to check with a wastewater engineer about that, especially with the TMDL allowances into watercourses.

p9, (30) is a definition for watercourse; should it include canals? or are farmers' canals interpreted to be included in 'ditches'?

p10, 85-2-311 (a)(ii)(C) states that legal availability of water is determined on physical water availability and existing legal demands; is there a requirement for specific lengths of time? (if ag use, need for irrigating fields in the summer, but no call for water in winter; but domestic or municipal uses are constant (you get the idea))

Does the DNRC or extension service or someone have numbers for typical amounts for a specific use? Number of gallons or acre feet for an acre of irrigated alfalfa, or for a municipality of a certain population?

p11, (e) does this section suffice for water leases?

P11, (2) "The applicant is required to prove in his application that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. If a A valid objection is filed, the objection must contain substantial credible information…"

p12, (3)(iv) this criteria for an appropriation as a reasonable use includes "the availability and feasibility of using low-quality water for the purpose for which the application has been made;"

does this allow for aquifer recharge or another use of coal bed methane water? That can be highly salinated, mineralized water, unsuitable for other uses because of its mineral and saline content.

Is there a definition of potable water?

p12, (3)(v) mentions saline seep. Is there a definition of saline seep, including measurements over land area, and a statement of existing conditions before a proposed appropriation is found to be a reasonable use? (baseline data from which to determine if the seep worsens)

p12, (3)(vi) says "significant adverse environmental impacts". Is there a definition or measure for 'significant'?

p13, (4)(c)(i) mentions projected water shortages. Does the department consider condition-limiting or time-limiting applications and appropriations?

p15, 85-2-360–these sections direct that studies or the applicant must predict net depletion. What if a net depletion is not predicted, but the appropriation actually DOES result in a net depletion? I assume it's action based on a complaint from another appropriator, but perhaps there should be some other or more consequence from the applicant's understated prediction of net depletion.

p18, (1)(b)(ii) refers to 'any amounts that will likely be lost in conveyance'. Is there a requirement or recommendation in statute for canals to be lined?

This same section (ii) directs a prediction of net depletion and amounts that might be returned to a system through percolation or other means. Is there any requirement for water samples from and a measure of distance to the "first level" groundwater aquifer (assumed to be the receiving water level of any surface water percolating down to groundwater)? Along with depth to aquifer, is there any requirement for baseline data of the water profile for chemical, nutrient, mineral content? Does the department require soil samples to help determine percolation or subsurface flow? Any requirement to measure the rate of percolation? (It'd be very different through hydric soils vs water soaking into the ground, then running along a deposit of shale!) Any reporting or mapping requirement of floodplains or soil types?

p19, items (D) and (E)(vi) in particular, hooray! Glad to see transmissivity

and locations of other wells included.

p20, (4) says the hydrogeo assessment, model, test well data, monitoring well data, etc. must be submitted to the dept. Does this include oil and gas uses? Is this required of opencut mining operations, or no, because there's no appropriation of water? (there is exposure of the groundwater to surface runoff and surface environmental effects for wet pits) Also, is this required of coal bed methane drilling operations?

p22, (5) same question about prediction vs actual net depletion: What if a net depletion is not predicted, but the appropriation actually DOES result in a net depletion?

LC5012

p2, (h) refers to aquatic resource activities and the federal Clean Water Act. Is there a definition of aquatic resource activities in state code?

p11, (9)(a) I wonder if we should give some allowance for repairs: "…if the appropriation is to re-create a functional a wetland with the intent to substantially replicate the predisturbance conditions by filling in, or removing, or replacing constructed ditches, drains, culverts, or similar structures."

p13, (iii) I wonder if this should include the legal description of the plat filing, or is that included in "the place of use"? I don't think so. Should we have a street address, as well as the legal description of the site?

p13, (e) is the water permit held by MDOT or by DNRC?

LC5009

p1, (b) states, "…The board may not require a permit for a water conveyance structure or for a natural spring if the water discharged to state waters does not contain industrial waste, sewage, or other wastes. Discharge to surface water of ground water that is not altered from its ambient quality does not constitute a discharge requiring a permit if:…"

I have a concern about "ground water that is not altered from its ambient quality" because water drawn from coal beds in coal bed methane drilling can be highly salinated and mineralized, so much so that the receiving waters are degraded (polluted). This is the situation of the Powder and Tongue Rivers from discharges of groundwater to those watercourses from drilling activities in Wyoming and Montana. We should require baseline data in a water profile of ground water for its chemical, nutrient, and mineral content, and parameters for acceptable levels both of the groundwater drawn AND of the receiving waters; if a river is already carrying too much content, then there should be a provision that the release of groundwater "that is not altered from its ambient quality" will not be allowed.

This is addressed to an extent on

p2, (ii) states, "the water discharged does not cause the receiving waters to exceed applicable standards for any parameters…" but I don't see in the previous text a requirement for baseline data and water composition for either the released waters or receiving waters. Is there one, somewhere?

p2, (5)(a) references the federal underground injection control program; does that cover all five classes of EPA underground injection wells?

p3, (5)(c) "…disposing of their own normal household wastes…" is there a definition for 'normal' household wastes? Considerations for toxic substances, paint, motor oil, etc.?

LC5020

One of my most primary concerns about this draft, just upon reading the intent "For an act allowing the DNRC to issue a preliminary determination on a water right permit or a change in appropriation right…" was for requirements of public notice, public hearings, release of finding (by the dept.) and preliminary recommendations. I'm glad to see some of this addressed on

p7, I recommend in (2) "…shall publish a notice once twice in a newspaper of general circulation…"

in (2)(b), I'd recommend language requiring the applicant to compile and submit to the dept. the addresses of appropriators, property owners, and specified area water users so that "…the department shall also serve notice by first-class mail…"

I serve on the Planning Board and Zoning Commission in Bozeman, and Bozeman's public notice requirements (of the city and of applicants) are beefier than the minimums in state statute. They serve us well. To do something like a zoning change, or a remodel of a home, or a minor subdivision, or to apply for a variance, public notice requires these things:

1. a yellow sign posted on the site (requirements of the contents of the notice are specified in our code) in a conspicuous place and for a term before any public meeting and before construction begins

2. publication once or twice in the local newspaper

3. and one of the most important, in my opinion, letters mailed first-class to adjacent property owners with the public notice. Our code, the Bozeman Unified Development Ordinance, 18.76.020.D, states: The applicant shall provide for the purposes of noticing a list of names and addresses of property owners within 200 feet of the site, using the most current known property owners of record as shown in the records of the County Clerk and Recorder's Office and stamped, unsealed envelopes (with no return address) addressed with names of above property owners, and/or labels with the names of the above property owners, as specified on the appropriate application.

Notice must be sent to adjacent property owners within 200 feet of the site. Keep in mind that this is for projects like building garages into backyard setbacks! I think a sliding scale based on the size of the operation or release of water (and the presumed impact on neighbors) could be established. Notice could follow water users along a watercourse, or those drawing water from the same aquifer.

The applicant is responsible for researching the names and addresses of adjacent and nearby property owners; the dept. should not spend its time on this. Failure of an applicant to provide a complete list can stall the whole project. I've rescheduled hearings and ordered re-noticing when property owners have not been adequately notified.

4. PUBLIC MEETINGS. All applications for subdivisions, zoning changes, etc. are heard in a public meeting, allowing public comment, by the city commission or Board of Adjustment. People come and have their say. We very rarely deny a project; instead, we place conditions of approval on them to mitigate their impacts. The same could, and should, be done with proposals for water appropriation. Local public meetings to present the proposal and explain all of the related effects (surface water runoff, groundwater protection, times of heavy use, mitigation plans, etc.) must be scheduled and held.

p7, perhaps add an item (iv) adjacent property owners within ???? of the proposed site, or users who draw water from the same aquifer, or along the receiving

watercourse at a distance of ???? downstream from the release point for which the appropriation proposes a permit or change in appropriation right.

this would reach a different group than item (i), which specifies "an appropriator of water". For people on exempt wells, (i) does not apply, right? so (iv) might serve that purpose.

p8, (4) states in part, "…if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons."

What if information, or an adverse affect, is found after the appropriation is made? Should there then be a requirement for notice to other appropriators and users, and objections filed?

p10, (1) "If the department determines…it shall hold a hearing pursuant to 2-4-604"

is this a public hearing? If not, then I propose adding the word "public" before the word "hearing".

In the rest of this section, I'm so pleased to see the language changed to accommodate regular citizens without formal representation in causes. But do we still need–or do we still allow somewhere–for the department to hold contested case hearings?

p12, (1) "…it shall hold a hearing pursuant to 2-4-604…" again, is this hearing a public hearing?

p13, (2) is there public notice on this objection period?

p18, (7) is this a public hearing?

(8) specifies that "The hearing shall be conducted under the contested case procedures…"

Is this the only provision for the contested case hearing? Or is this supposed to be a hearing, per the changes from contested case hearing to hearing in other sections?

LC5021

p3, (2) "…the department may attach to the controlling works a written notice, properly dated and signed…"

Does this serve as public notice? Is there a need for public notice?

p3, (5) "A county attorney…may request assistance from the attorney general or the department."

p4, (7) can extensions be granted if remedies are being done?

LC5015

p2, (b) "in high-growth areas"–is there a definition of high-growth area? There should also be consideration (read: ability to deny) for over-appropriated areas and for closed basins with respect to availability for high-growth areas.

How does the revolving loan fund affect, if at all, the TSEP prioritization, size of projects, etc.?

p3, the numbering is hinky. (4), then (8), (9), (14), (2), (17).

p3, (2) Is there consideration for number of lots or users? How about for the distance to connect to a municipal or community system? the text says 15 service connections, then to serve 25 year-round residents. Does that jive? We should go by connection, not people in a household.

p5, numbering on the page–(c) should be (b), (d) should be (c), (e) should be (d)

p9 has the WPIC discussed the term of the loans? I don't think the fund can last over a project's "structural and material design life". When subdivisions are approved, the term for that approval is three years, and build-out must occur in that time, otherwise the applicant must re-apply. How about a term for a loan limited to a specific length of time, with repayment beginning as soon as ???? units are connected and being served by the system?

p10, (2) "…the first of which must be received not more than 1 year after construction commences or the first users are connected to the system, and before the completion date of the project and the last of which must be received not more than 20 five years after the completion date."

p13, (3)(a) will municipalities be invited to apply with info like the number of subdivisions or lots platted by the city? will developers and subdividers submit info based on the criteria in this section?

p17, "A creation of state debt would requires a 2/3 vote of each house…"

JP Pomnichowski

Montana State Representative

House District 63, Bozeman/Gallatin County

406 587 7846 pomnicho@montanadsl.net

Kolman, Joe

From: JP Pomnichowski [pomnicho@montanadsl.net]
Sent: Wednesday, July 30, 2008 5:51 PM
To: Kolman, Joe
Cc: 'JP Pomnichowski'
Subject: WPIC questions and comments

Hello, Mr. Kolman,

Thanks for your time today when I called. I've reviewed the packet of materials sent June 30: your report entitled Water—Montana's Treasure and appendices, WPIC findings and options, and bill drafts, and I have some questions, comments, and suggestions. Please do answer what you can, or refer me elsewhere, and send any pertinent comments to the WPIC.

In Water—Montana's Treasure (WMT), page 6, you discuss tribal water compacts.

Do you know where tribal water compacts are available online or at a state or federal agency?

[WMT page 7] Who is required to maintain the St. Mary project? (part of the Fort Belknap Compact)

Where can I find info on the permitting freeze on the Flathead Reservation (per the MT Supreme Court?)

Does a state reserved water right lapse from lack of use? If so, is there a timeframe that must be met, or a measure of water that has not been used?

[WMT page 8] The second bullet point describes exempt wells used primarily for domestic use, with the exception that "...a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation [35gpm or 10 af/y] requires a permit."

Is there an administrative rule or other requirement to measure depth to aquifer or otherwise determine that multiple wells are drawing from the same water source? If all wells are drawing from the same depth, presumably (or proved to be) from the same aquifer, that would mean, I believe, that that would be a combined appropriation from the same source [of water].

Is this requirement not met because the cumulative impact and combined appropriation is made by many people instead of one user?

[WMT page 11] Where induced infiltration and pre-stream capture have been established as detrimental effects to surface water from subsurface waters (the basis for the TU Smith River decision), is there a rule or procedure for cumulative effect from combined appropriations like subdivisions?

Today in our conversation you mentioned that the Montana Bureau of Mining and Geology (MBMG) has stated that subsurface characteristics may define connectivity between surface water and groundwater. Indeed, if substrata is bedrock, or a clay layer, or another broad and impervious layer from the surface to a groundwater aquifer, then the subterranean aquifer may not contribute to surface waters.

Where can I get a copy of the DNRC EA for the Smith River (2003)?

[WMT page 14] Is there a date for the Montana Supreme Court to consider DNRC's appeal of Lohmeier v. State of Montana?

Has the DNRC withdrawn its motion for appeal?

[WMT page 17, second-to-last paragraph] New non-exempt wells located 600 feet from any other production well—

Is there a measurement to depth of the aquifer?

Is there required water sampling?

[WMT page 24, paragraph 3] Today on the phone we talked about drainfields, mixing zones, and distance from wells. To my knowledge, there is no requirement in state code other than a required minimum LINEAR distance of 100 feet from well head to septic drainfield. There should be a requirement for slope/grade!! And for cumulative mixing zones; I wouldn't want the guy farthest downhill in the subdivision—or in the household a quarter mile away—to be drinking well water. Eeeeeuww.

[WMT page 30] Does Legislative Services or another state entity subscribe to Water Strategist?

Are the issues in the state library or at the capitol?

[WPIC Findings and Options]

p2, re: Controlled Groundwater Areas (CGWA)

Bozeman has many CGWAs. For more than ten years, there has been a CGWA in the heart of Bozeman, right off of Main Street in a shopping complex. In the 1990s, groundwater was contaminated by a dry cleaning operation that disposed of its chemicals incorrectly, and there has been a restriction on groundwater use ever since. Bozeman residents are still waiting, ten years later, for a groundwater management plan from the state. Currently, there is no plan in place to clean or remove material contaminated by the pollutants, although oily, toxic material seeps up through the concrete floors of the stores on site, and of some of the homes in the plume. The material has spread northeast as the slope allows, and residents and city government are still waiting for a clean-up plan and mitigation from our state agencies.

The grade of the area is such that groundwater and surface water drains to tributary creeks and, through storm drains and natural percolation, directly to the East Gallatin River. The Gallatin, Madison, and Jefferson are the headwater rivers of the Missouri. For limited quantity and overappropriation, ALL are in closed basins! This makes a threat to water quality all the more problematic.

The WPIC recommended No Action on proposed actions to revise CGWA statutes. I would ask for your support for Option B, Revise CGWA statutes.

p4, re: DNRC enforcement

Has the DNRC pursued a procedure or process to enforce statutory limits on exempt wells?

Can counties be empowered to exercise enforcement?

p5, Finding 1 states that "A combined appropriation from the same source is interpreted to mean the

wells are physically connected by a pipe."

Who has made this finding?

A combined appropriation should not be interpreted based upon the method by which the water is drawn (one or more pipes), BUT ON THE DRAW FROM A SINGLE SOURCE OF WATER.

p5, Finding 3 states that less than 5 percent of total statewide water consumption is drawn by exempt wells.

This measure determined statewide is far too general. What is true for Broadus is not true for Bozeman. The intensity of use in high-growth areas averaged out with rural, very low use areas does not serve to establish low statewide consumption, especially if intensive use occurs in over-appropriated basins and closed basins, and in areas in which there is far more population to serve.

There should be county-specific determinations, or determinations by BASIN. Legislation and administrative rules should apply with intensity of use and available supply.

p5, Finding 7 Does the DNRC support metering new exempt wells?

p5, Finding 8 Are there definitions and measures of water for each listed use? (domestic, stock watering, etc.)

p5, Findings 9,10 Domestic water use includes ¼ acre lawn irrigation, but subdivisions require open space, parks, boulevards, etc.

For irrigation wells for public open space and parks, who maps and measures those wells?

A change in subdivision regulations may be in order to require some active parkland (game fields, playgrounds, etc.) to a certain proportion, and with a certain allowable irrigation, and passive parkland and open space planted in native drought-resistant grasses and not irrigated. There could be considerations for boulevard trees (again, drought-tolerant species) and for open space water consumption not to exceed XX amount annually. Bozeman city regs address these requirements; perhaps for developments anywhere of a certain density, they should apply, too, since the density of population and water consumption will trigger more usage.

p5, Finding 12 In the 07 regular session, the House Natural Resources committee heard HB104 proposing to change exempt wells from 10 acre feet/year to 1 acre foot/year (and keep 35 gpm pumping). Evidence shows that the vast majority of users on exempt wells pump less than 1 acre foot/year. The bill died in committee, but this standard jives with the allowances of Colorado (15gpm for 1 acre), Idaho (18 gpm for ½ acre), North Dakota (7.6gpm for one acre), and Wyoming (25gpm for one acre).

The WPIC should support and advance the changes proposed in HB104 (07 session).

p6, Finding 14, Option H recommends requiring minor subdivisions to undergo environmental assessment for effects on water supply. There is precedent to require minor and major subdivisions to meet the same requirements for public health and safety. In the 07 session, HB415 (Reinhart) passed, and requires that minor subdivisions dedicate parkland, just as major subdivs do. I have served on the Bozeman Planning Board and Zoning Commission for many years, and the requirements for water and sewer must be met for homesites.

The WPIC should support and advance requiring environmental assessment for water supply in minor subdivs.

p6, Finding 14, Option K The WPIC should propose to change the rate or volume for exempt wells per HB104 (as above).

p6, Finding 14, Option L The WPIC should strongly advocate to change the definition of a combined appropriation!!!

p6, Finding 14, Option M The WPIC should support and advance a minimum lot size for exempt wells, and increase the minimum lot size for an individual septic system. Also, consideration for grade/slope from wellheads, depth to aquifer, mixing zones, etc.

p6, Finding 14, Option P The WPIC should support and advance legislation to limit or prohibit the use of exempt wells for fish ponds.

I'll send remarks on the bill drafts in a separate email.

Thanks,

JP Pomnichowski

Montana State Representative

House District 63, Bozeman/Gallatin County

406 587 7846 pomnicho@montanadsl.net

Kolman, Joe

From: Holly Franz [holly@franzdriscoll.com]
Sent: Thursday, July 31, 2008 10:29 PM
To: Kolman, Joe
Subject: Water

Dear Mr. Kolman:

I am writing to provide PPL Montana, LLC's ("PPLM") initial comments on LC 5019 and LC 5020.

PPLM cannot support LC 5019 in its current form. PPLM's primary concern regarding LC 5019 is its exemption of subdivision water use from the permitting process. As drafted, water use permits and change authorizations for water used in a subdivision are not subject to the objections of other water users. This is a drastic change that will, for the first time since the adoption of the Montana Water Use Act, prevent existing water users from protecting their water rights in the permitting process. The bill draft not only exempts new water permits from objection, but it also includes changes. This may allow a senior water right to be changed in a manner that expands the senior right to the detriment of all junior users. While the bill draft requires DNRC to review subdivision permits and changes, DNRC simply is not as familiar with local water conditions as the actual users in the area. Existing senior water users should not be shut out of the permitting review process.

In addition, PPLM is unaware of any rationale for treating subdivision water rights different from water rights for other purposes. Why should the irrigation of lawns and gardens in a subdivision have a preference over the irrigation of crops? Quite frankly, Montana does not need another exemption to the water permitting process.

A secondary concern is the definition of domestic use contained in LC 5019. That definition includes garden and landscaping irrigation up to five acres. In these water tight times, Montana should not be encouraging lawns of this size.

Turning to LC 5020, PPLM is generally in favor of the concept outlined in this bill draft. This draft addresses the problems potentially created by the recent *Bostwick v. DNRC* district court decision while maintaining the burden of proof on the applicant. The Water Use Act's requirement that an applicant prove the statutory criteria for a permit or change is a key protection for senior water users that must be maintained.

Thank you for the opportunity to provide comments on these bill drafts.

Holly Franz
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Kolman, Joe

From: Kathleen Shaw [kathleeninthewoods@gmail.com]
Sent: Monday, July 07, 2008 12:35 PM
To: Kolman, Joe
Subject: Water

Dear Sir,

I don't know if what I am asking is included in the plans for the water policy, but it should be.

When I moved here three years ago, a water line brought spring water from a spring four lots uphill, and went beyond me to a residence three lots below me. Then a man bought the property and the next three lots between us and just recently cut off my water supply. He pipes it to his house, which is just behind my property. He removed the pipes that led to my line. Then he went back home to Louisiana, and all of the extra water, what isn't coming from his sprinkler hoses, is running down a ditch in the road, while I am forced to drive 25 miles to town to fill 50 gallon drums with water for myself and my animals. It does seem fair that he can do what he wants with his water, however, it is not fair to waste the extra and put me in a serious bind. It costs me $15 each trip for gas for my truck. I am too young for a rural improvement grant. I do not have a positive cash flow for a rural improvement loan. I have no income. I have been trying to get SSI for three years, and I just found out after waiting seven months that I won't get a new hearing for another 12 months. Water is a necessity, and I desperately need it. No one should be allowed to waste it and deprive their neighbors. His overflow is more than enough for me. There needs to be a provision in the law to protect people like me who need water.

Sincerely,
Kathleen Shaw
25 Spring Valley Road (Clarkston)
P.O. Box 871
Three Forks, MT 59752

MONTANA TROUT UNLIMITED
432 N. Last Chance Gulch
P.O. Box 412 Helena, MT 59624 (406) 449-9933

The Honorable Jim Elliott,
Presiding Officer of the Water Policy Interim Committee

July 31, 2008

Re: TU Comments on WIPIC Draft Findings and Conclusions.

Dear Senator Elliott:

Trout Unlimited (TU) has been an active participant in the WPIC's meetings and discussions, and appreciates the work that legislative members of, and staff supporting the work of, the WPIC have put in over the last year. TU submits these comments on the draft WPIC Findings and Options for Recommendations in the hopes of continuing the good work of the WPIC, and ensuring that Montana's water policy respects the rights of senior appropriators and protects our state's water supply.

I. Water Policy

TU supports an expanded MBMG study. However, in order to ensure that the hydrogeologic study provided in LC5007 is not duplicative of MBMG's currently-funded program to collect and analyze groundwater data, LC5007 should explicitly require the MBMG to create a hydrogeologic model that can be used to help predict and understand ground and surface water interactions in each subbasin analyzed.

TU Recommendation: In LC5007, on page 1, New Section 1(1), the last sentence should be amended to read: The program shall develop a monitoring plan and hydrogeologic model for each subbasin for which a report is prepared.

II. General Water Quantity and Quality

TU supports the narrow exception for the Montana Department of Transportation (MDT) to obtain a water right permit solely for wetland *restoration* that is found in LC5012. TU would not support reading the narrow scope of LC5012 to include *created* wetlands. Including created wetlands in LC5012 would expand water demands on

already-overappropriated streams, harming senior water rights and reducing streamflows. TU therefore suggests making the intended scope of LC5012's exception more explicit, to ensure that only *restored* wetlands are included within its scope.

TU Recommendation: Amend the language in LC5012, New SubSection (9)(a), on page 11, that provides for an automatic water right, "if the appropriation is to restore ~~recreate~~ a functional wetland with the intent to substantially replicate the predisturbance conditions by filling in or removing constructed ditches, drains, or similar structures that drained an historically functional wetland."

III. Government Issues

TU supports increased coordination between the DNRC and DEQ. TU also supports local governments' efforts to promote the use of central water and sewer systems, progressive water metering, the use of treated waste water for lawn and garden irrigation, and the restoration of natural-vegetation infiltration galleries and permeable pavement for mediating stormwater collection that encourages slow groundwater recharge.

TU Recommendation: Support LC5014 to provide local government with clear authority to preferentially approve subdivisions with central water and sewer systems.

IV. Water Use Enforcement

TU supports efforts to increase effective monitoring and enforcement of water use. TU would encourage the Water Policy Interim Committee to continue to think about ways to promote accurate measurement and monitoring of water use, particularly the development of systems that would develop the capacity to monitor and adjust water use remotely. The Bureau of Reclamation has implemented this kind of system with water users in the Sevier River Basin in Utah, and a trial of a similar system in a Montana river basin could be a good first-step to more efficient water use and management.

In terms of additional enforcement capacity, it is not realistic that county attorneys are going to take on complex water enforcement actions. But it is a possibility the State Attorney General's office should develop the expertise and capacity to take on a limited number of water rights enforcement actions.

TU Recommendation: TU supports LC 5021.

V. Water Supply and Sewage Disposal

The increasing use of exempt groundwater wells in major and minor subdivision development has been one of the WPIC's central areas of study. Because the DNRC does not analyze---nor require mitigation of---the collective impact of individual wells the potential for harm to streamflows and senior water rights is not addressed.

Indeed, a district court in New Mexico made headlines just this month when the New Mexico exempt-well statute was declared unconstitutional for precisely that reason. In New Mexico, a long-time ranching family challenged a new exempt-well subdivision proposed near their ranch on the grounds that the exempt wells would not even be analyzed for their impact on the ranch's water supply. The district court agreed with the ranchers, citing New Mexico's constitutional protection for senior water users, that new water use cannot adversely affect existing rights. *Bounds v. State of New Mexico*, CV-2006-166 (July 10, 2008). An editorial in the *Sante Fe New Mexican* noted that the district court judge expressed that, *"It doesn't work for the Bounds and other irrigators to sit around waiting until they're out of water . . . When the water is gone, it will be too late."* In New Mexico, as in Montana, previous efforts to pass new legislation to treat individual, domestic wells like other water withdrawals had stalled before the legislature. In the wake of the court ruling, the New Mexico State Engineer's office is now scrambling to come up with a solution to having to process thousands of additional permits each year, in order to analyze each individual well permit application.

TU Recommendation:

1. Amend Exempt Well Statute. Rather than wait for a Montana court to force the Montana DNRC into a similarly difficult situation, the Committee should amend MCA § 85-2-306(1) as follows:

> "~~Outside the boundaries of a controlled groundwater area,~~ a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed ~~10~~ 0.75 acre-feet per year for the purpose of a stockwater tank or for domestic use, except that ~~a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation~~ a well on a tract of record that is created by subdivision after [the effective date of this legislation] requires a permit."

This amendment will stop the use of multiple, individual wells *exempt from DNRC review* in the development of subdivisions. Under the amended statute, a developer may still use individual wells on lots created from a subdivision of land, but the cumulative impact of those individual wells must be evaluated in a DNRC permit proceeding. As amended, the statute would essentially grandfather in the use of exempt wells on all existing lots, or lots that have already been subdivided.

The WPIC's draft Findings and Options for Recommendations, under "Finding 14: Incentives are needed to encourage public water and sewer systems," lists as an option to

"Require that exempt wells purchase a mitigation credit." (Option "O" on page 5). This option could work in concert with the above amendment of Section 306(1) by allowing individual wells to purchase a "mitigation credit" that would satisfy the requirement for addressing the individual well's "net depletion" in closed basins. Under this scenario, the "mitigation credit" would be used to purchase a larger block of mitigation water that is held by the DNRC or by local government, and the purchase of the "mitigation credit" would in effect be a "purchase" of a very small slice of mitigation water. This would decrease the transaction costs for a person who needs only a small amount of mitigation water in order to satisfy DNRC's groundwater permitting requirements in closed basins. Such an approach would also significantly reduce the burden on DNRC for permit review and processing of individual wells.

2. Amend LC5015. In a similar vein, TU also recommends amending LC5015, so that the revolving fund for central water and sewer systems is funded, at least in part, by a substantial fee on the use of an exempt well on a tract of land less than 100 acres.

In addition, TU recommends amending LC5015 to preferentially fund those applications to the revolving fund that include such additional measures as progressive water metering, the use of treated waste water for lawn and garden irrigation, or the restoration of natural-vegetation infiltration galleries and permeable pavement for mediating stormwater collection that encourages slow groundwater recharge.

3. Do Not Introduce LC 5019 A foundation of the New Mexico's court ruling was the constitutional protection for senior water right holders that is fundamental to the prior appropriation system. LC5019 undermines this fundamental aspect of Montana's prior appropriation doctrine by eliminating the ability of existing water right holders to object to those aspects of a new water right permit that may adversely affect their water rights. *See,* New Section 1, sub-section (2), that eliminates the application of MCA §§ 85-2-307 through 311 and 85-2-363.

Of equal concern is sub-section (5) of New Section 1, that prevents a senior water right holder from even obtaining judicial review of a newly-granted permit that may harm his or her water rights. Sub-section (5) allows judicial review only when " . . . substantial rights of an aggrieved party have been prejudiced . . .." On its face, this language appears to limit judicial review to an applicant or the agency, as the only two entities that have been "parties" to the permit process. LC5019 makes no provision for senior water right holders to comment on the permit application or otherwise be involved in shaping the administrative record that would go before the district court, and give them clear standing to even participate in judicial review of a permit application. For these reasons, TU does not believe that LC5019 would make any positive contribution to sound water policy or management in Montana.

VI. DNRC Permit Review

LC5020 makes changes in the way that the DNRC review permit applications. Specifically, LC5020 does five things:

(1) It allows DNRC to meet informally with an applicant for a new permit or a change to discuss the application;
(2) It requires the department to make a written preliminary determination as to whether the application satisfies the criteria for a permit or change to be awarded;
(3) Specifically recognizes the department's authority to impose conditions that would allow the issuance of an approval;
(4) If DNRC proposes to grant an application, it requires the agency to describe the rationale for that proposed decision; and
(5) It provides for a two tiered hearing process, depending on whether the preliminary recommendation is for grant or denial.

TU supports the concept embodied in this draft, and in fact had proposed something similar during the 2007 discussions on HB 831. This idea appeals to us because it creates some transparency in the decision-making process that does not currently exist. Currently, DNRC, for fear of being accused of pre-judging the process, closely holds its opinions about an application until the very end of the process. This poses its own series of problems for applicants.

"Preliminary" is the key word here. By requiring a preliminary determination LC 5020 compels the agency to provide everybody—applicant and potential objectors alike--some advance notice of how the department is tilting, based on the evidence they have seen, with some description of the rationale behind the preliminary determination. This can provide the applicant some chance to at least make its case to the hearing examiner that the department's preliminary finding is wrong, and it can provide potential objectors some indication of how difficult it may be to successfully prosecute an objection.

One concern TU has is that, as currently drafted, section 5(1) of LC 5020 sets up a two-tiered hearing process which might actually encumber the process needlessly. In effect, if DNRC's preliminary determination is that the application should be denied, it will issue notice of that to the applicant, and the applicant can seek a hearing. If the applicant prevails at the hearing, section 5(1) appears to require a second hearing, to notify potential objectors of the decision to grant. It would seem more economical to fold all of that process into one hearing.

TU Recommendation: Pursue a bill that captures the concept of a preliminary decision obligation, but reduce the amount of process to a single opportunity for a hearing for both applicant and objector.

Conclusion

TU supports the work of the WPIC, and would be happy to discuss these recommendations further with any member of the WPIC.

Sincerely,

Mark Aagenes Conservation Director
Montana Trout Unlimited
Laura Ziemer Director Montana Water
Project of Trout Unlimited
Stan Bradshaw Staff Attorney Montana
Water Project of Trout Unlimited

Kolman, Joe

From: Dr Vicki Watson [vicki.watson@umontana.edu]
Sent: Wednesday, July 30, 2008 8:35 PM
To: Kolman, Joe
Subject: water

Joe -- please let me know that comment were received. Thanks, VW

Comments on the Water Policy Interim Committee's draft report

I regret that I have not had the time this summer to give this report the attention deserved by such important policy issues.

I appreciate the history of Montana water policy & law that the report provides. The report also makes clear that Montana's limited water resources face growing threats, and that our economy and way of life depend on how we address those challenges.

I have just a few general comments to the committee.

First, I think that aquifer recharge and injection have grave risks for groundwater contamination, and should be allowed only under the most extraordinary circumstances (if at all).

Instead, we should accept that more and more basins have reached the limit of their ability to provide water for human demands. And that new water demands associated with new development will require the purchase of land with water rights and the conversion of those rights to different uses. In addition, developers and municipalities can pay for water conservation measures for existing water users, and then lease the salvaged water. We are fooling ourselves if we think that we can continue to increase our demand for water, and meet those demands by interbasin transfers of water and/or injecting wastewater. Moving water from one basin to another just transfers the shortage to another basin. Before injecting any treated wastewater into groundwater, that treated wastewater should be clean enough to use directly. And if it is, why inject it? Simply use it directly.
I was concerned to see the statement that aquifer recharge plans would require that total nitrogen in the discharge should be 24 mg/L or less. This far exceeds the drinking water standard of 10 mg/L of nitrate nitrogen. Once again, we should not inject or recharge undrinkable water into our groundwater. Some particulate contaminants can be removed, but nitrate is not filtered out.

Second, Land use planning must be contingent on water availability. If the water is not available to support denser development, the land is not suitable for more dense development.

Third, one area of concern that I feel the report neglects is how climate change will increase water shortage problems. The report points out the increased demands associated with population growth and development. But says little about the impact of climate change. Climate change will likely result in the closure of more basins. And in increased conflicts over water. Hence it is essential to recognize all demands placed on water. There should be no exemptions for water uses. All water users (including all domestic wells), must apply for water rights, and must be included in water budgets. As water supply to existing users dwindles, we want to be sure that climate change is the cause and not the incremental loss to many small users exempted from regulation and accounting. In order to identify where we can best conserve water, we need a complete picture of how & where it is being used.

Fourth, Riding herd on more water rights, and performing increasingly complex hydrologic analyses (including assessing prestream capture of tributary groundwater, for example), means that DNRC needs more resources to perform these duties in a timely and competent fashion. Developers complain about the time required to obtain permits. Adequate analysis requires time and money. Permit application fees should be increased to cover these costs. We cannot wish the costs away. We must provide DNRC with the resources to do this critical job well. I would prefer that those requesting new water rights pay DNRC for hydrologic analyses and then DNRC contracts for the work. Rather than hoping that someone hired directly by the developer will provide an objective assessment.

I thank the WPIC for their hard work on this important issue and for the opportunity to pass along these general thoughts.

Dr. Vicki Watson, Professor of Environmental Studies
University of Montana. Missoula, MT 59812

Montana
Association of REALTORS®

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TO: **Water Policy Interim Committee, Sen. Elliott, Chair**

FROM: **Montana Association of REALTORS®**

RE: **Comments on Water Policy Interim Committee draft legislation and reports**

DATE: **July 30, 2008**

The Water Policy Interim Committee ("WPIC") has recently published for public comment draft legislation covering a number of topics within WPIC's purview, WPIC's draft report to the 61st Legislature as required by House Bill ("HB") 304 and findings and options for recommendations, and the draft case study report by the Montana Bureau of Mines and Geology ("MBMG") as required by HB 831. The following comments are respectfully submitted on behalf of the Montana Association of REALTORS® ("MAR"). MAR may provide additional comments after further review or upon revisions to the draft legislation. MAR appreciates the opportunity to comment on the draft legislation at this early stage and look forward to working with WPIC to develop viable solutions for all Montana's water users.

BILL DRAFTS

I. LC 5007

The development of statewide groundwater and aquifer data would certainly be useful to water users and applicants for beneficial use permits, particularly given the dearth of such information at present and the requirement for specific aquifer and sub-basin data in the hydrogeologic assessments that applicants for beneficial use permits in closed basins must now submit to the Montana Department of Natural Resources and Conservation ("DNRC"). LC 5007 does have the potential to develop useful and meaningful information on groundwater resources statewide. However, because the information that could be developed under LC 5007 does affect so many stakeholders in the issue of water rights in Montana, membership in the ground water assessment steering committee should be expanded to include a representative from the development community.

II. LC 5009

As presently drafted LC 5009 has the potential to have far-reaching and perhaps unintended impacts on mitigation plans. A mitigation plan under Mont. Code Ann. § 85-3-362(2) can include something as simple as purchasing surface water rights and leaving those rights in-stream. Leaving a surface water right instream rather than diverting it does not have any significant impact on water quality, as it does not discharge any water or other substances to the stream

that are not already present in the stream upstream of the historic point of diversion for the surface water right to be converted to instream use for mitigation.

As LC 5009 is currently written, there is no assurance that such a simple mitigation plan would not be required to obtain a discharge permit. Although Department of Environmental Quality ("DEQ") administrative rules under Title 76, Part 6, Chapter 4 do set forth standards for determining nonsignificant changes in water quality, an applicant for a new beneficial use permit that is mitigating adverse effect through the conversion of a surface water right to an instream right still has to at least go through the process of determining whether they meet the criteria for nonsignificant changes in water quality set forth in Admin. R. Mont. 17. 30.715. LC 5009 could be significantly improved and clarified by inserting language that mitigation plans which consist of converting surface water rights to instream use are not subject to the provisions of LC 5009. For example, in Section 2 could be revised as follows (suggested changes in CAPS):

> **Section 2.** Section 75-5-410, MCA is amended to read:
> **"75-5-410. Water quality of ~~return flows and discharges associated with~~ aquifer recharge or CERTAIN mitigation plan~~s~~—minimum requirements.** (1) A person who proposes ~~to use sewage from a system requiring a water quality permit for the purposes of aquifer recharge pursuant to 85-2-362 or plans to use sewage from a system requiring a water quality permit as a return flow to minimize the amount of water necessary to offset adverse effects resulting from net depletion of surface water through~~ an aquifer recharge plan or mitigation plan pursuant to 85-2-362 shall obtain, if necessary, a current permit pursuant to this chapter. A MITIGATION PLAN THAT CONSISTS OF A CHANGE OF PURPOSE IN A SURFACE WATER RIGHT TO INSTREAM FLOW FOR MITIGATION PURPOSES PURSUANT TO 85-2-362 AND 85-2-402 IS NOT SUBJECT TO PERMITTING PURSUANT TO THIS CHAPTER.

The above-suggested revision to Section 2 of LC 5009 would eliminate unnecessary evaluations for both water users and, possibly, DEQ, by making clear that although a conversion of a surface water right to instream flow for mitigation purposes is technically an addition of water to a source, it does not discharge any water or contaminants to the source that are not already present upstream of the historic point of diversion. Pursuant to Mont. Code Ann. § 85-2-402, objectors may still raise valid objections to a change application on the basis of water quality, thereby assuring that the water quality of senior appropriators will not be adversely affected.

III. LC 5012

At this time, MAR takes no position on this bill draft.

IV. LC 5014

Although community water and sewer systems may be preferable in certain developments or subdivisions, granting local governing bodies the authority to require such systems creates two problematic issues that should be seriously considered before adopting legislation such as LC 5014. The proposal of LC 5014 creates the very real possibility of 56 different standards for exempt wells, with each county setting its own criteria for when, where, and how exempt wells will and will not be allowed. Additionally, LC 5014 disregards the reality of community water system development post-HB831. By setting up a permitting system that is costly in terms of both time and money, exempt wells are often a more cost-efficient solution to providing domestic water within certain housing developments. However, by allowing counties to require

public water systems, LC 5014 sets up a very real possibility that some counties will force developers into water solutions and a permitting process that are unfeasible in terms of both cost and technology.

Furthermore, it must be kept in mind that scientific data have clearly demonstrated that if there is a groundwater shortage in Montana, a hypothesis that has not yet been proven and, in fact, has evidence to the contrary, exempt wells constitute an extremely small portion of the demand for groundwater and of water demands in closed basins and statewide.

V. LC 5015

As presently drafted, LC 5015 provides no assistance to those developers who desire to use public water and sewer systems in new subdivisions. Section 3(2) of LC 5015 limits applicants for loans from the proposed sustainable development revolving fund program to "an incorporated city or town, a county, a consolidated local government, a tribal government, a county or multicounty water or sewer district, or an authority as defined in 75-6-304" (a regional water and/or wastewater authority). Private developers may neither apply for nor receive loans under LC 5015. If the intent of LC 5015 is to encourage the use of public water and sewer systems where they may be appropriate, without the inclusion of private developers in that class of persons who may apply for and receive revolving fund loans, LC 5015 cannot achieve that goal.

Additionally, LC 5015 contains legislative findings that are unsupported by available scientific data. Specifically, Section 2(2)(b) of LC 5015 finds that "public water and sewer systems in subdivisions are preferable to individual wells and septic systems in order to protect water quality and the holders of senior water rights." The information brought before WPIC during the 2007-2008 interim has not supported such a broad finding. Rather, WPIC has received information from DEQ that, in addition to cost considerations, lot size, build-out schedules, and aquifer characteristics are all factors to consider in choosing whether to use a community system or individual wells. ("Community Wells vs. Single Family Wells" presented by Eric Regensburger, October 24, 2007, Choteau) Further, WPIC has also received information that cumulative effects of individual wells on water quantity and availability, if any, are not reasonably projected to result "in any discernable, detectable or measurable adverse impact to any prior surface water appropriator." ("Update on Evaluations Significance of Exempt Wells" presented by Michael Nicklin, January 15, 2008). Findings that are unsupported by available data and are actually contrary to data presented to WPIC should not be included in legislation proposed by WPIC.

VI. LC 5019

HB 831 as codified is clear that mitigation or aquifer recharge is required for a new groundwater appropriation in a closed basin only to the extent that net depletion results in adverse effect. LC 5019 eliminates the distinction between net depletion and adverse effect for any applicant for a new beneficial use permit that proposes to appropriate groundwater to provide domestic water within a subdivision. *See*, LC 5019 Sec. 1(1), Sec. 2(23). In short, LC 5019 requires mitigation or aquifer recharge in excess of what is necessary to ensure no adverse effect on the water rights of senior appropriators. Such excessive mitigation or aquifer recharge would artificially accelerate the exhaustion of available surface water supplies, which would in turn quickly create an inflated water market in the state. LC 5019 would also leave less water available for both new and existing appropriators by encouraging mitigation and aquifer recharge in excess of adverse effect, leading to over-utilization of surface water resources. By requiring mitigation or

aquifer recharge "to offset net depletion" with no consideration of adverse effect, LC 5019 encourages an applicant for a new groundwater right to provide domestic water in a subdivision to buy up existing surface water rights (typically irrigation rights) in excess of the amount of the proposed withdrawal that may result in net depletion and the amount of that net depletion that may be adverse effect on senior water users and leave that water instream, leaving formerly irrigated ground "high and dry" without any showing or knowledge of the actual need to draw water away from productive agricultural property. In short, by requiring mitigation or aquifer recharge of any net depletion absent consideration of actual adverse effect, LC 5019 encourages the purchase of excessive surface water rights, which could quickly drive up the value of surface water rights, pricing developers of workforce housing as well as agricultural users out of the market.

In requiring mitigation or aquifer recharge for any net depletion, not just adverse effect, LC 5019 also disregards the available data, which indicates that the idea that any change in stream conditions in closed basins (*i.e.,* any net depletion) is *de facto* adverse effect is false. Rather, what a proper water balance does indicate is that both ground and surface water are available to meet present and future demands in closed basins without any discernable impact to senior water users. *See*, May 2008 Water Resource Evaluation Water Rights in Closed Basins prepared by Nicklin Earth and Water. To equate any net depletion with adverse effect is to allow existing appropriators to "command a source," preventing any changes in the condition of water occurrence, regardless of whether prior appropriators can reasonably exercise their water rights under changed conditions. Mont. Code Ann. § 85-2-401 plainly states that the right to so command a source is not within the scope of priority of appropriation. However, LC 5019 eliminates this distinction within closed basins for subdivisions that use a public water supply system. Not only is such elimination contrary to existing law, but it is unsupported by the available data.

LC 5019 also introduces considerable increased uncertainty into the application process by exempting an application for a new beneficial use permit that proposes to use groundwater within a closed basin to supply domestic water to a subdivision from the clear criteria for permit issuance set forth in Mont. Code Ann. § 85-2-311. *See,* LC 5019, Section 1(2). Is an applicant still required to demonstrate physical and legal availability, adequacy of appropriation works, that the proposed use is a beneficial use, and possessory interest in the place of use? Absent the applicability of Mont. Code Ann. § 85-2-311, this is unclear.

VII. LC 5020

Before undertaking significant revisions of a permit process that, up until the very recent past, has worked relatively well for both applicants and objectors, it is worthwhile to determine exactly what the source of the significant increase in the time, cost, and frustration required to process a permit application is. Under existing statute, DNRC must notify the applicant of any defects in any application within 180 days of receipt. Mont. Code Ann. § 85-2-302(5). Upon notice of any deficiencies, the applicant has 90 days to correct those deficiencies. Mont. Code Ann. § 85-2-302(7). Upon correction of the deficiencies, DNRC can then deem the application correct and complete, which means that the application contains "substantial credible information" showing that each of the criteria for permit issuance set forth in Mont. Code Ann. § 85-2-311 (new beneficial use permit applications) or Mont. Code Ann. § 85-2-402 (change applications) has been met. *See,* Admin. R. Mont. 32.12.1601. Even a cursory examination of the applicable regulations setting the guidelines for a correct and complete determination reveal that it is more than just simply making sure all blanks are filled in. If that were the case, there would be no

requirement that the information provided be "substantial credible information," only that something be filled in. Such is not the case.

Following a correct and complete determination, the application goes out for public notice. Mont. Code Ann. § 85-2-307. After such notice, DNRC must either grant, deny, or condition the application within 120 days if no objections are received or within 180 days is objections are received or a hearing is held, with an extension of up to 60 additional days. Mont. Code Ann. § 85-2-310. Such a process allows for significant scrutiny of the application prior to public notice, the opportunity for any senior appropriators that believe they will be adversely affected to object, and for timely hearing and decision, as long as the applicable statutes and regulations are followed.

Section 1(8) of LC 5020 would amend the statutory definition of "correct and complete" such that it merely means that DNRC can "begin" to evaluate the "information." Given the significant guidelines for a correct and complete determination at present (*see, i.e.,* Admin. R. Mont. 32.12.1701 to 1707), it begs the question of exactly what evaluation DNRC is doing during the period providing for in Mont. Code Ann. § 85-2-302, which is not affected by LC 5020, if not "evaluating" the application. Ostensibly, under LC 5020, an applicant could go through a 270-day period of receiving deficiency notices from DNRC and responding to those notices, only to then have DNRC "begin" to evaluate the application, leaving one to wonder exactly where any expediting of the process is, particularly when the "evaluation" is not required to take place within any given timeframe. *See*, LC 5020, Sections 2 and 5.

Any amendment to the permitting process should also consider the role of those agency personnel who actually conduct hearings on permit applications, formal or otherwise. At present, DNRC has adopted a practice of issuing statements of opinion on those applications where there either is no objector or any objections have been withdrawn. The applicant's opportunity for hearing is then typically to the author of the statement of opinion. LC 5020 proposes significant changes to the hearing opportunities available to applicants, without addressing the need for neutral and independent evaluators. Any change to the permitting process should consider the appropriate role for hearing examiners and removing those agency personnel who serve as hearing examiners from the rest of the agency's evaluation process.

VIII. LC 5021

At this time, MAR takes no position on this bill draft.

FINDINGS AND RECOMMENDATIONS

At this time, MAR has no significant comments on either WPIC's draft report or MBMG's draft case study report. However, the following are comments and suggestions on WPIC's draft Findings and Options for Recommendations.

I. General Water Quantity and Quality

A. Finding 2

During the June 2008 WPIC meeting, both DNRC and MAR discussed proposals for reform of the existing controlled groundwater area statutes. Mont. Code Ann. §§ 85-2-501, *et seq.* Legislative hearings and debate during the 2007 session on HB 203 and 205 evidenced

significant difficulty and frustration on the part of both DNRC and the public with the existing statutes. To recommend no action at this time ignores one area of water law that, at present, is unworkable for all parties involved. MAR continues to work with DNRC and other stakeholders to develop a proposal for revising the controlled groundwater area statutes to make them more practical and usable for all parties. WPIC should reconsider its recommendation to take no action on controlled groundwater area statutes.

B. Finding 6

MAR refers to its comments above on LC 5009. LC 5009 should be modified to clarify that discharge permits are not necessary for mitigation plans that consist of converting surface water rights to instream purposes.

II. Government Issues

A. Finding 3

Neither current statute nor applicable regulations prevent DNRC from meeting with applicants "informally" during the permitting process. However, given that a determination on a permitting decision is reviewable by a district court based only on the administrative record, it is extremely important that the record contain all information submitted by an applicant demonstrating that the relevant statutory criteria are met. Additionally, it is equally important that the administrative record contain a full written record of the basis for DNRC's decision on any permit application. Consequently, "informal" discussions and decisions could result in only greater confusion and more room for arbitrary and capricious decision-making. MAR further refers to its comments on LC 5020 above.

III. Water Supply & Sewage Disposal

A. Finding 4

As discussed in comments on LC 5015 and LC 5019 above, data presented to WPIC does not support a finding that exempt wells result in a discernable cumulative adverse impact on senior appropriators, either at present or reasonably projected into the future. This is the result of both overall water availability and the relative consumptive rate from exempt wells, particularly in comparison with other water uses such as agricultural irrigation. As also discussed above, a mere change in the condition of water occurrence is not an adverse effect as long as a prior appropriator can reasonable exercise their water right under the changed conditions. Mont. Code Ann. § 85-2-401(1).

B. Finding 14

In regard to Recommendation A that an applicant for a new beneficial use permit for groundwater in a closed basin to provide domestic water within a subdivision be required to offset net depletion, MAR refers to its comments on LC 5019 above. Eliminating the distinction between net depletion and adverse effect is contrary to both legal precedent and available science. As to Recommendation B on a revolving loan program, MAR refers to its comments on LC 5015 above. As presently drafted, LC 5015 provides no assistance to private developers who may choose to use public water and sewer systems in subdivision development.

Once again, MAR thanks WPIC for the opportunity to provide comment on draft legislation at this early stage and looks forward to working with the committee and staff to develop viable solutions to challenges facing current and future Montana water users.

_____ BILL NO. _____

INTRODUCED BY _____
(Primary Sponsor)

BY REQUEST OF THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER RIGHT ENFORCEMENT LAWS; ALLOWING FOR THE LIMITED APPOINTMENT OF WATER MASTERS AS SPECIAL MASTERS IN DISTRICT COURT PROCEEDINGS; REQUIRING THAT PROTECTION OF PRIOR APPROPRIATORS BE GIVEN PRIORITY IN JUDICIAL ENFORCEMENT CONSIDERATIONS; MAKING THE PURSUIT OF VOLUNTARY COMPLIANCE OPTIONAL; ELIMINATING CERTAIN CRIMINAL PENALTIES; ESTABLISHING A WATER RIGHT ENFORCEMENT PROGRAM AND A WATER RIGHT ENFORCEMENT ACCOUNT; PROVIDING A STATUTORY APPROPRIATION; AND AMENDING SECTIONS 3-7-311, 17-7-502, 85-2-114, AND 85-2-122, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 3-7-311, MCA, is amended to read:

"3-7-311. Duties of water masters. (1) The water master has the general powers given to a master by Rule 53(c), M.R.Civ.P.

(2) Within a reasonable time after June 30, 1983, the water master shall issue a report to the water judge meeting the requirements for the preliminary decree as specified in 85-2-231.

(3) After a water judge issues a preliminary decree, the water master shall assist the water judge in the performance of the water division's further duties as ordered by the water judge.

(4) A water master may be appointed by a district court to serve as a special master to a district court for actions brought pursuant to 85-2-114(1) or (3) or 85-5-301 if the appointment is approved by the chief water judge."

Section 2. Section 17-7-502, MCA, is amended to read:

"17-7-502. Statutory appropriations -- definition -- requisites for validity. (1) A statutory appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the

need for a biennial legislative appropriation or budget amendment.

(2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both of the following provisions:

(a) The law containing the statutory authority must be listed in subsection (3).

(b) The law or portion of the law making a statutory appropriation must specifically state that a statutory appropriation is made as provided in this section.

(3) The following laws are the only laws containing statutory appropriations: 2-17-105; 5-11-120; 5-11-407; 5-13-403; 7-4-2502; 10-1-1202; 10-1-1303; 10-2-603; 10-3-203; 10-3-310; 10-3-312; 10-3-314; 10-4-301; 15-1-121; 15-1-218; 15-23-706; 15-31-906; 15-35-108; 15-36-332; 15-37-117; 15-39-110; 15-65-121; 15-70-101; 15-70-369; 15-70-601; 16-11-509; 17-3-106; 17-3-212; 17-3-222; 17-3-241; 17-6-101; 17-7-304; 18-11-112; 19-3-319; 19-6-404; 19-6-410; 19-9-702; 19-13-604; 19-17-301; 19-18-512; 19-19-305; 19-19-506; 19-20-604; 19-20-607; 19-21-203; 20-8-107; 20-9-534; 20-9-622; 20-26-1503; 22-3-1004; 23-4-105; 23-4-202; 23-4-204; 23-4-302; 23-4-304; 23-5-306; 23-5-409; 23-5-612; 23-7-301; 23-7-402; 37-43-204; 37-51-501; 39-71-503; 41-5-2011; 42-2-105; 44-1-504; [section 5]; 44-12-206; 44-13-102; 50-4-623; 53-1-109; 53-6-703; 53-24-108; 53-24-206; 60-11-115; 61-3-415; 69-3-870; 75-1-1101; 75-5-1108; 75-6-214; 75-11-313; 76-13-150; 77-1-108; 77-2-362; 80-2-222; 80-4-416; 80-5-510; 80-11-518; 82-11-161; 87-1-513; 90-1-115; 90-1-205; 90-3-1003; and 90-9-306.

(4) There is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing, paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued pursuant to the laws of Montana. Agencies that have entered into agreements authorized by the laws of Montana to pay the state treasurer, for deposit in accordance with 17-2-101 through 17-2-107, as determined by the state treasurer, an amount sufficient to pay the principal and interest as due on the bonds or notes have statutory appropriation authority for the payments. (In subsection (3): pursuant to sec. 10, Ch. 360, L. 1999, the inclusion of 19-20-604 terminates when the amortization period for the teachers' retirement system's unfunded liability is 10 years or less; pursuant to sec. 4, Ch. 497, L. 1999, the inclusion of 15-38-202 terminates July 1, 2014; pursuant to sec. 10(2), Ch. 10, Sp. L. May 2000, and secs. 3 and 6, Ch. 481, L. 2003, the inclusion of 15-35-108 terminates June 30, 2010; pursuant to sec. 17, Ch. 593, L. 2005, the inclusion of 15-31-906 terminates January 1, 2010; pursuant to sec. 73, Ch. 44, L. 2007, the inclusion of 19-6-410 terminates upon the death of the last recipient eligible under 19-6-709(2) for the supplemental benefit provided by 19-6-709; and pursuant to sec. 6, Ch. 2, Sp. L. September 2007, the inclusion of 76-13-150 terminates June 30, 2009.)"

Section 3. Section 85-2-114, MCA, is amended to read:

"85-2-114. Judicial enforcement. (1) If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use the water, or violating a provision of this chapter, it may~~, after reasonable attempts have failed to obtain voluntary compliance as provided in subsection (4),~~ petition the district court supervising the distribution of water among appropriators from the source to:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use;

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference; or

(c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter. Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter is being violated.

(2) Upon the issuance of an order or injunction, the department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it. The notice constitutes legal notice to all persons interested in the appropriation or distribution of the water.

(3) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin the waste, unlawful use, interference, or violation.

(4) The county attorney or the attorney general may ~~prosecute under 85-2-122(1)~~ bring suit to enjoin the waste, unlawful use, interference, or violation or bring an action under ~~85-2-122(2)~~ 85-2-122(1) without being requested to do so by the department. ~~The attorney general and a county attorney are subject to the voluntary compliance provisions of subsection (4).~~

(5) A county attorney who takes action pursuant to subsection (3) or (4) may request assistance from the attorney general.

(6) When enforcing the provisions of this section, the department, the county attorney, and the attorney general shall give priority to protecting the water rights of a prior appropriator under an existing water right, a

certificate, a permit, or a state water reservation.

~~(4)~~(7) ~~The~~ After considering the provisions of subsection (6), the department ~~shall~~ may attempt to obtain voluntary compliance through warning, conference, or any other appropriate means before petitioning the district court under subsection (1). ~~The attempts~~ An attempt to obtain voluntary compliance under this subsection must extend over a period of at least 7 days and may not exceed 30 working days."

Section 4. Section 85-2-122, MCA, is amended to read:

"85-2-122. Penalties. ~~(1) A person who violates or refuses or neglects to comply with the provisions of this chapter, any order of the department, or any rule of the department is guilty of a misdemeanor.~~

~~(2)~~(1) Except as provided in 85-2-410(6), a person who violates or refuses or neglects to comply with the provisions of 85-2-114, any order of the department, or any rule of the department is subject to a civil penalty not to exceed $1,000 per violation. Each day of violation constitutes a separate violation.

~~(3) (a)~~(2) Except as provided in subsection ~~(3)(b)~~ (3), fines collected by the department or a district court under subsection ~~(2)~~ (1) must be deposited in the account established in 85-2-318 for use by the department in the enforcement of 85-2-114.

~~(b)~~(3) If a fine is collected by an independent action brought by:

(a) the county attorney, the fine must be deposited in the general fund of the county~~.~~; or

(b) the county attorney with assistance from the attorney general or by the attorney general, the fine must be deposited in the water right enforcement account created in [section 5] and must be used to enforce the provisions of 85-2-114."

NEW SECTION. **Section 5. Water right enforcement account -- statutory appropriation.** (1) There is a water right enforcement account in the state special revenue fund.

(2) Fines collected pursuant to 85-2-122(3)(b) must be deposited in the water right enforcement account.

(3) The money in the account is statutorily appropriated, as provided in 17-7-502, to the department of justice to enforce the provisions of 85-2-114.

NEW SECTION. **Section 6. Water right enforcement program.** There is a water right enforcement program in the department of justice. The program staff may enforce the provisions of 85-2-114. The program is under the supervision and control of the attorney general.

NEW SECTION. **Section 7. Codification instruction.** [Sections 5 and 6] are intended to be codified as an integral part of Title 44, chapter 4, and the provisions of Title 44, chapter 4, apply to [sections 5 and 6].

- END -

SENATE BILL NO. 17

INTRODUCED BY G. PERRY

BY REQUEST OF THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING PROVISIONS IN LOCAL SUBDIVISION REGULATIONS THAT REQUIRE A PUBLIC WATER SUPPLY SYSTEM AND A PUBLIC SEWER SYSTEM IN CERTAIN SUBDIVISIONS; PROVIDING A PROCESS FOR ALTERNATIVES TO THE REQUIRED PUBLIC WATER SUPPLY SYSTEM AND PUBLIC SEWER SYSTEM; AND AMENDING SECTIONS 76-3-504, 76-3-511, 76-3-601, 76-3-604, AND 76-3-622, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 76-3-504, MCA, is amended to read:

"76-3-504. Subdivision regulations -- contents. (1) The subdivision regulations adopted under this chapter must, at a minimum:

(a) list the materials that must be included in a subdivision application in order for the application to be determined to contain the required elements for the purposes of the review required in 76-3-604(1);

(b) except as provided in 76-3-210, 76-3-509, or 76-3-609, require the subdivider to submit to the governing body an environmental assessment as prescribed in 76-3-603;

(c) establish procedures consistent with this chapter for the submission and review of subdivision applications and amended applications;

(d) prescribe the form and contents of preliminary plats and the documents to accompany final plats;

(e) provide for the identification of areas that, because of natural or human-caused hazards, are unsuitable for subdivision development. The regulations must prohibit subdivisions in these areas unless the hazards can be eliminated or overcome by approved construction techniques or other mitigation measures authorized under 76-3-608(4) and (5). Approved construction techniques or other mitigation measures may not include building regulations as defined in 50-60-101 other than those identified by the department of labor and industry as provided in 50-60-901.

(f) prohibit subdivisions for building purposes in areas located within the floodway of a flood of 100-year frequency, as defined by Title 76, chapter 5, or determined to be subject to flooding by the governing body;

(g) prescribe standards for:

(i) the design and arrangement of lots, streets, and roads;

(ii) grading and drainage; and

~~(iii) subject to the provisions of 76-3-511,water supply and sewage and solid waste disposal that meet the:~~

~~(A) regulations adopted by the department of environmental quality under 76-4-104 for subdivisions that will create one or more parcels containing less than 20 acres; and~~

~~(B) standards provided in 76-3-604 and 76-3-622 for subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres; and~~

~~(iv)~~(iii) the location and installation of public utilities;

(h) provide procedures for the administration of the park and open-space requirements of this chapter;

(i) provide for the review of subdivision applications by affected public utilities and those agencies of local, state, and federal government identified during the preapplication consultation conducted pursuant to subsection (1)(q) or those having a substantial interest in a proposed subdivision. A public utility or agency review may not delay the governing body's action on the application beyond the time limits specified in this chapter, and the failure of any agency to complete a review of an application may not be a basis for rejection of the application by the governing body.

(j) when a subdivision creates parcels with lot sizes averaging less than 5 acres, require the subdivider to:

(i) reserve all or a portion of the appropriation water rights owned by the owner of the land to be subdivided and transfer the water rights to a single entity for use by landowners within the subdivision who have a legal right to the water and reserve and sever any remaining surface water rights from the land;

(ii) if the land to be subdivided is subject to a contract or interest in a public or private entity formed to provide the use of a water right on the subdivision lots, establish a landowner's water use agreement administered through a single entity that specifies administration and the rights and responsibilities of landowners within the subdivision who have a legal right and access to the water; or

(iii) reserve and sever all surface water rights from the land;

(k) (i) except as provided in subsection (1)(k)(ii), require the subdivider to establish ditch easements in the subdivision that:

(A) are in locations of appropriate topographic characteristics and sufficient width to allow the physical

placement and unobstructed maintenance of open ditches or belowground pipelines for the delivery of water for irrigation to persons and lands legally entitled to the water under an appropriated water right or permit of an irrigation district or other private or public entity formed to provide for the use of the water right on the subdivision lots;

(B) are a sufficient distance from the centerline of the ditch to allow for construction, repair, maintenance, and inspection of the ditch; and

(C) prohibit the placement of structures or the planting of vegetation other than grass within the ditch easement without the written permission of the ditch owner.

(ii) Establishment of easements pursuant to this subsection (1)(k) is not required if:

(A) the average lot size is 1 acre or less and the subdivider provides for disclosure, in a manner acceptable to the governing body, that adequately notifies potential buyers of lots that are classified as irrigated land and may continue to be assessed for irrigation water delivery even though the water may not be deliverable; or

(B) the water rights are removed or the process has been initiated to remove the water rights from the subdivided land through an appropriate legal or administrative process and if the removal or intended removal is denoted on the preliminary plat. If removal of water rights is not complete upon filing of the final plat, the subdivider shall provide written notification to prospective buyers of the intent to remove the water right and shall document that intent, when applicable, in agreements and legal documents for related sales transactions.

(l) require the subdivider, unless otherwise provided for under separate written agreement or filed easement, to file and record ditch easements for unobstructed use and maintenance of existing water delivery ditches, pipelines, and facilities in the subdivision that are necessary to convey water through the subdivision to lands adjacent to or beyond the subdivision boundaries in quantities and in a manner that are consistent with historic and legal rights;

(m) require the subdivider to describe, dimension, and show public utility easements in the subdivision on the final plat in their true and correct location. The public utility easements must be of sufficient width to allow the physical placement and unobstructed maintenance of public utility facilities for the provision of public utility services within the subdivision.

(n) establish whether the governing body, its authorized agent or agency, or both will hold public hearings;

(o) establish procedures describing how the governing body or its agent or agency will address

information presented at the hearing or hearings held pursuant to 76-3-605 and 76-3-615;

(p) establish criteria that the governing body or reviewing authority will use to determine whether a proposed method of disposition using the exemptions provided in 76-3-201 or 76-3-207 is an attempt to evade the requirements of this chapter. The regulations must provide for an appeals process to the governing body if the reviewing authority is not the governing body.

(q) establish a preapplication process that:

(i) requires a subdivider to meet with the agent or agency, other than the governing body, that is designated by the governing body to review subdivision applications prior to the subdivider submitting the application;

(ii) requires, for informational purposes only, identification of the state laws, local regulations, and growth policy provisions, if a growth policy has been adopted, that may apply to the subdivision review process;

(iii) requires a list to be made available to the subdivider of the public utilities, those agencies of local, state, and federal government, and any other entities that may be contacted for comment on the subdivision application and the timeframes that the public utilities, agencies, and other entities are given to respond. If, during the review of the application, the agent or agency designated by the governing body contacts a public utility, agency, or other entity that was not included on the list originally made available to the subdivider, the agent or agency shall notify the subdivider of the contact and the timeframe for response.

(iv) requires that a preapplication meeting take place no more than 30 days from the date that the agent or agency receives a written request for a preapplication meeting from the subdivider; and

(v) establishes a time limit after a preapplication meeting by which an application must be submitted as provided in 76-3-604.

(2) (a) The subdivision regulations adopted under this chapter must prescribe standards for water supply and sewage and solid waste disposal.

(b) Except as provided in subsection (2)(c), the standards must, at a minimum, meet the:

(i) regulations adopted by the department of environmental quality under 76-4-104 for subdivisions that will create one or more parcels containing less than 20 acres; and

(ii) standards provided in 76-3-604 and 76-3-622 for subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres.

(c) When a residential subdivision creates 30 or more lots with an average lot size of less than 3 acres, the standards must require the subdivider to:

(i) install a public water system and a public sewer system that meet the regulations adopted by the department of environmental quality under 76-4-104; or

(ii) seek approval from the local governing body to install an alternative to a public water system and public sewer system. The local governing body shall hold a public hearing on the proposal based on the information provided pursuant to 76-3-622 (4).

(d) The provisions of 76-3-511 apply to subsection (2)(b) of this section but do not apply to subsection (2)(c).

~~(2)~~(3) In order to accomplish the purposes described in 76-3-501, the subdivision regulations adopted under 76-3-509 and this section may include provisions that are consistent with this section that promote cluster development.

~~(3)~~(4) The governing body may establish deadlines for submittal of subdivision applications."

Section 2. Section 76-3-511, MCA, is amended to read:

"76-3-511. Local regulations no more stringent than state regulations or guidelines. (1) Except as provided in subsections (2) through (4) or unless required by state law, a governing body may not adopt a regulation under 76-3-501 or ~~76-3-504(1)(f)(iii)~~ 76-3-504(2)(b) that is more stringent than the comparable state regulations or guidelines that address the same circumstances. The governing body may incorporate by reference comparable state regulations or guidelines.

(2) The governing body may adopt a regulation to implement 76-3-501 or ~~76-3-504(1)(f)(iii)~~ 76-3-504(2)(b) that is more stringent than comparable state regulations or guidelines only if the governing body makes a written finding, after a public hearing and public comment and based on evidence in the record, that:

(a) the proposed local standard or requirement protects public health or the environment; and

(b) the local standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

(3) The written finding must reference information and peer-reviewed scientific studies contained in the record that forms the basis for the governing body's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed local standard or requirement.

(4) (a) A person affected by a regulation of the governing body adopted after January 1, 1990, and before April 14, 1995, that that person believes to be more stringent than comparable state regulations or guidelines may

petition the governing body to review the regulation. If the governing body determines that the regulation is more stringent than comparable state regulations or guidelines, the governing body shall comply with this section by either revising the regulation to conform to the state regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 12 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged regulation. The governing body may charge a petition filing fee in an amount not to exceed $250.

(b) A person may also petition the governing body for a regulation review under subsection (4)(a) if the governing body adopts a regulation after January 1, 1990, in an area in which no state regulations or guidelines existed and the state government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted governing body regulation."

Section 3. Section 76-3-601, MCA, is amended to read:

"76-3-601. Submission of application and preliminary plat for review -- water and sanitation information required. (1) Subject to the submittal deadlines established as provided in ~~76-3-504(3)~~ 76-3-504(4), the subdivider shall present to the governing body or to the agent or agency designated by the governing body the subdivision application, including the preliminary plat of the proposed subdivision, for local review. The preliminary plat must show all pertinent features of the proposed subdivision and all proposed improvements and must be accompanied by the preliminary water and sanitation information required under 76-3-622.

(2) (a) When the proposed subdivision lies within the boundaries of an incorporated city or town, the application and preliminary plat must be submitted to and approved by the city or town governing body.

(b) When the proposed subdivision is situated entirely in an unincorporated area, the application and preliminary plat must be submitted to and approved by the governing body of the county. However, if the proposed subdivision lies within 1 mile of a third-class city or town, within 2 miles of a second-class city, or within 3 miles of a first-class city, the county governing body shall submit the application and preliminary plat to the city or town governing body or its designated agent for review and comment. If the proposed subdivision is situated within a rural school district, as described in 20-9-615, the county governing body shall provide a summary of the information contained in the application and preliminary plat to school district trustees.

(c) If the proposed subdivision lies partly within an incorporated city or town, the application and preliminary plat must be submitted to and approved by both the city or town and the county governing bodies.

(d) When a proposed subdivision is also proposed to be annexed to a municipality, the governing body

of the municipality shall coordinate the subdivision review and annexation procedures to minimize duplication of hearings, reports, and other requirements whenever possible.

(3) The provisions of 76-3-604, 76-3-605, 76-3-608 through 76-3-610, and this section do not limit the authority of certain municipalities to regulate subdivisions beyond their corporate limits pursuant to 7-3-4444."

Section 4. Section 76-3-604, MCA, is amended to read:

"**76-3-604. Review of subdivision application -- review for required elements and sufficiency of information.** (1) (a) Within 5 working days of receipt of a subdivision application submitted in accordance with any deadlines established pursuant to ~~76-3-504(3)~~ 76-3-504(4) and receipt of the review fee submitted as provided in 76-3-602, the reviewing agent or agency shall determine whether the application contains all of the listed materials as required by 76-3-504(1)(a) and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

(b) If the reviewing agent or agency determines that elements are missing from the application, the reviewing agent or agency shall identify those elements in the notification.

(2) (a) Within 15 working days after the reviewing agent or agency notifies the subdivider or the subdivider's agent that the application contains all of the required elements as provided in subsection (1), the reviewing agent or agency shall determine whether the application and required elements contain detailed, supporting information that is sufficient to allow for the review of the proposed subdivision under the provisions of this chapter and the local regulations adopted pursuant to this chapter and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

(b) If the reviewing agent or agency determines that information in the application is not sufficient to allow for review of the proposed subdivision, the reviewing agent or agency shall identify the insufficient information in its notification.

(c) A determination that an application contains sufficient information for review as provided in this subsection (2) does not ensure that the proposed subdivision will be approved or conditionally approved by the governing body and does not limit the ability of the reviewing agent or agency or the governing body to request additional information during the review process.

(3) The time limits provided in subsections (1) and (2) apply to each submittal of the application until:

(a) a determination is made that the application contains the required elements and sufficient information; and

(b) the subdivider or the subdivider's agent is notified.

(4) After the reviewing agent or agency has notified the subdivider or the subdivider's agent that an application contains sufficient information as provided in subsection (2), the governing body shall approve, conditionally approve, or deny the proposed subdivision within 60 working days, based on its determination of whether the application conforms to the provisions of this chapter and to the local regulations adopted pursuant to this chapter, unless:

(a) the subdivider and the reviewing agent or agency agree to an extension or suspension of the review period, not to exceed 1 year; or

(b) a subsequent public hearing is scheduled and held as provided in 76-3-615.

(5) If the governing body denies or conditionally approves the proposed subdivision, it shall send the subdivider a letter, with the appropriate signature, that complies with the provisions of 76-3-620.

(6) (a) The governing body shall collect public comment submitted at a hearing or hearings regarding the information presented pursuant to 76-3-622 and shall make any comments submitted or a summary of the comments submitted available to the subdivider within 30 days after conditional approval or approval of the subdivision application and preliminary plat.

(b) The subdivider shall, as part of the subdivider's application for sanitation approval, forward the comments or the summary provided by the governing body to the:

(i) reviewing authority provided for in Title 76, chapter 4, for subdivisions that will create one or more parcels containing less than 20 acres; and

(ii) local health department or board of health for proposed subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres.

(7) (a) For a proposed subdivision that will create one or more parcels containing less than 20 acres, the governing body may require approval by the department of environmental quality as a condition of approval of the final plat.

(b) For a proposed subdivision that will create one or more parcels containing 20 acres or more, the governing body may condition approval of the final plat upon the subdivider demonstrating, pursuant to 76-3-622, that there is an adequate water source and at least one area for a septic system and a replacement drainfield for each lot.

(8) (a) Review and approval, conditional approval, or denial of a proposed subdivision under this chapter may occur only under those regulations in effect at the time a subdivision application is determined to contain

sufficient information for review as provided in subsection (2).

(b) If regulations change during the review periods provided in subsections (1) and (2), the determination of whether the application contains the required elements and sufficient information must be based on the new regulations."

Section 5. Section 76-3-622, MCA, is amended to read:

"76-3-622. Water and sanitation information to accompany preliminary plat. (1) Except as provided in subsection (2), the subdivider shall submit to the governing body or to the agent or agency designated by the governing body the information listed in this section for proposed subdivisions that will include new water supply or wastewater facilities. The information must include:

(a) a vicinity map or plan that shows:

(i) the location, within 100 feet outside of the exterior property line of the subdivision and on the proposed lots, of:

(A) flood plains;

(B) surface water features;

(C) springs;

(D) irrigation ditches;

(E) existing, previously approved, and, for parcels less than 20 acres, proposed water wells and wastewater treatment systems;

(F) for parcels less than 20 acres, mixing zones identified as provided in subsection (1)(g); and

(G) the representative drainfield site used for the soil profile description as required under subsection (1)(d); and

(ii) the location, within 500 feet outside of the exterior property line of the subdivision, of public water and sewer facilities;

(b) a description of the proposed subdivision's water supply systems, storm water systems, solid waste disposal systems, and wastewater treatment systems, including whether the water supply and wastewater treatment systems are individual, shared, multiple user, or public as those systems are defined in rules published by the department of environmental quality;

(c) a drawing of the conceptual lot layout at a scale no smaller than 1 inch equal to 200 feet that shows all information required for a lot layout document in rules adopted by the department of environmental quality

pursuant to 76-4-104;

(d) evidence of suitability for new onsite wastewater treatment systems that, at a minimum, includes:

(i) a soil profile description from a representative drainfield site identified on the vicinity map, as provided in subsection (1)(a)(i)(G), that complies with standards published by the department of environmental quality;

(ii) demonstration that the soil profile contains a minimum of 4 feet of vertical separation distance between the bottom of the permeable surface of the proposed wastewater treatment system and a limiting layer; and

(iii) in cases in which the soil profile or other information indicates that ground water is within 7 feet of the natural ground surface, evidence that the ground water will not exceed the minimum vertical separation distance provided in subsection (1)(d)(ii);

(e) for new water supply systems, unless cisterns are proposed, evidence of adequate water availability:

(i) obtained from well logs or testing of onsite or nearby wells;

(ii) obtained from information contained in published hydrogeological reports; or

(iii) as otherwise specified by rules adopted by the department of environmental quality pursuant to 76-4-104;

(f) evidence of sufficient water quality in accordance with rules adopted by the department of environmental quality pursuant to 76-4-104;

(g) a preliminary analysis of potential impacts to ground water quality from new wastewater treatment systems, using as guidance rules adopted by the board of environmental review pursuant to 75-5-301 and 75-5-303 related to standard mixing zones for ground water, source specific mixing zones, and nonsignificant changes in water quality. The preliminary analysis may be based on currently available information and must consider the effects of overlapping mixing zones from proposed and existing wastewater treatment systems within and directly adjacent to the subdivision. Instead of performing the preliminary analysis required under this subsection (1)(g), the subdivider may perform a complete nondegradation analysis in the same manner as is required for an application that is reviewed under Title 76, chapter 4.

(2) A subdivider whose land division is excluded from review under 76-4-125(2) is not required to submit the information required in this section.

(3) ~~A~~ Except as provided in subsection (4), a governing body may not, through adoption of regulations, require water and sanitation information in addition to the information required under this section unless the governing body complies with the procedures provided in 76-3-511.

(4) A subdivider who proposes an alternative to the public water system and public sewer system

required by 76-3-504(2)(c) shall provide:

(a) information that shows by a preponderance of the evidence that the proposed alternative protects public health and the environment;

(b) information that shows by a preponderance of the evidence that the proposed alternative can mitigate harm to public health and the environment and is achievable under current technology;

(c) evidence that the conclusions asserted in subsections (4)(a) and (4)(b) are supported by peer-reviewed scientific studies; and

(d) a comparison of the costs to the regulated community that are directly attributable to the requirement for a public water system and a public sewer system versus the costs for the proposed alternative."

- END -

_____ BILL NO. _____

INTRODUCED BY _____
(Primary Sponsor)

BY REQUEST OF THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE WATER PERMIT AND CHANGE IN APPROPRIATION RIGHT PROCESS; CLARIFYING THE DEFINITION OF "CORRECT AND COMPLETE"; REQUIRING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO ISSUE A PRELIMINARY DETERMINATION ON A WATER RIGHT PERMIT OR A CHANGE IN APPROPRIATION RIGHT; PROVIDING FOR OBJECTIONS TO BE HEARD IN AN INFORMAL HEARING; REQUIRING PERMIT OR CHANGE IN APPROPRIATION RIGHT DECISIONS WITHIN 90 DAYS AFTER CLOSE OF ADMINISTRATIVE RECORD; AND AMENDING SECTIONS 85-2-102, 85-2-307, 85-2-308, 85-2-309, 85-2-310, 85-2-401, AND 85-2-804, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with 85-2-436;

(d) in the case of the United States department of agriculture, forest service:

(i) instream flows and in situ use of water created in 85-20-1401, Article V; or

(ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow to protect, maintain, or enhance streamflows in accordance with 85-2-320;

(e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the

fishery resource in accordance with 85-2-408;

(f) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; or

(g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(2) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water.

(3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under 85-2-436;

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; or

(f) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(5) "Certificate" means a certificate of water right issued by the department.

(6) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(7) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(8) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information <u>for the department to begin evaluating the information</u>.

(9) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(10) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(11) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(12) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(13) "Ground water" means any water that is beneath the ground surface.

(14) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(15) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water.

(16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

(17) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(18) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(19) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

(20) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(21) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water

throughout the year or at periods or for defined lengths of time.

(22) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(23) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(24) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(25) "Water division" means a drainage basin as defined in 3-7-102.

(26) "Water judge" means a judge as provided for in Title 3, chapter 7.

(27) "Water master" means a master as provided for in Title 3, chapter 7.

(28) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(29) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-307, MCA, is amended to read:

"85-2-307. Notice of application for permit or change in appropriation right. (1) Upon receipt of an application for a permit or a change in appropriation right, the department shall publish notice of receipt of the application on the department's website.

~~(1)~~(2) (a) ~~Upon~~ Within 120 days of the receipt of a correct and complete application for a permit or change in appropriation right, the department:

(i) may meet informally with the applicant and the persons listed in subsection (2)(d) to discuss the application;

(ii) shall make a written preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right; and

(iii) may include conditions in the written preliminary determination to satisfy applicable criteria for issuance of a permit or change in appropriation right.

(b) If the preliminary determination proposes to grant an application, the department shall prepare a notice containing the facts pertinent to the application, including the summary of the preliminary determination

and any conditions, and shall publish the notice once in a newspaper of general circulation in the area of the source.

(c) If the preliminary determination proposes to deny an application, the process provided in 85-2-310 must be followed.

~~(b)~~(d) Before the date of publication, the department shall also serve the notice by first-class mail upon:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

~~(c)~~(e) The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation.

~~(d)~~(f) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

~~(2)~~(3) The notice ~~shall~~ must state that by a date set by the department, ~~(~~not less than 15 days or more than 60 days after the date of publication~~)~~, persons may file with the department written objections to the application.

~~(3)~~(4) The requirements of subsections ~~(1)~~ (2) and ~~(2)~~ (3) do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons."

Section 3. Section 85-2-308, MCA, is amended to read:

"85-2-308. Objections. (1) (a) An objection to an application under this chapter must be filed by the date specified by the department under 85-2-307~~(2)~~(3).

(b) The objection to an application for a permit must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-311 are not met.

(2) For an application for a change in appropriation rights, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-320, if applicable, 85-2-402, 85-2-407, 85-2-408, and 85-2-436, if applicable, are not met.

(3) A person has standing to file an objection under this section if the property, water rights, or interests

of the objector would be adversely affected by the proposed appropriation.

(4) For an application for a reservation of water, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-316 are not met.

(5) An objector to an application under this chapter shall file a correct and complete objection on a form prescribed by the department within the time period stated on the public notice associated with the application. In order to assist both applicants and objectors, the department shall adopt rules in accordance with this chapter delineating the components of a correct and complete objection. For instream flow water rights for fish, wildlife, and recreation, the rules must require the objector to describe the reach or portion of the reach of the stream or river subject to the instream flow water right and the beneficial use that is adversely affected and to identify the point or points where the instream flow water right is measured and monitored. The department shall notify the objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of notification of the defects is terminated.

(6) An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and complete objection within the prescribed time period, and has stated the applicable information required under this section and rules of the department."

Section 4. Section 85-2-309, MCA, is amended to read:

"85-2-309. Hearings on objections -- jurisdiction. (1) If the department determines that an objection to an application for a permit under 85-2-311 or change ~~approval~~ in appropriation right under 85-2-402 states a valid objection, it shall hold a ~~contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 60 days from the date set by the department for the filing of objections,~~ hearing pursuant to 2-4-604 for the objector to show cause before the department as to why the permit or change in appropriation right should not be granted or should be granted with additional or different conditions after serving notice of the hearing by first-class mail upon the applicant and the objector, unless the department certifies an issue to the district court for determination by a water judge under subsection (2). The applicant shall participate in this hearing and retains the burden of proof on the applicable criteria. The department may consolidate hearings if more than one objection is filed to an application. The department shall allow for discovery. The department shall file in its records proof of the service by affidavit of the department.

(2) (a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the district court all factual and legal issues involving

the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a water judge over all other adjudication matters.

(b) If the department fails to certify an issue as provided in this section after a timely request by a party to the hearing, the department shall include its denial to certify as part of the record of the hearing.

(c) Upon determination of the issues certified to it by the department, the court shall remand the matter to the department for further processing of the application under this chapter.

(3) Subsection (2) does not apply in the case of a matter considered at a hearing under this section pursuant to 85-2-316 or 85-2-322."

Section 5. Section 85-2-310, MCA, is amended to read:

"85-2-310. Action on application for permit or change in appropriation right. (1) ~~The department shall grant, deny, or condition an application for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended by not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by 85-2-308.~~ If the department proposes to deny an application for a permit or a change in appropriation right under 85-2-307, unless the applicant withdraws the application, the department shall hold a hearing pursuant to 2-4-604 after serving notice of the hearing by first-class mail upon the applicant for the applicant to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be denied.

(2) A proposal to grant an application with or without conditions following a hearing on a proposal to deny the application must proceed as if the department proposed to grant the application in its preliminary determination pursuant to 85-2-307.

(3) If valid objections are not received on an application or if valid objections are unconditionally withdrawn and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right as proposed in the preliminary determination pursuant to 85-2-307.

(4) If valid objections to an application are received and withdrawn with conditions stipulated with the applicant and the department preliminarily determined to grant the permit or change in appropriation right, the department may consider, without hearing, the proposed conditions and grant the permit or change in appropriation right subject to conditions as necessary to satisfy applicable criteria.

(5) The department shall deny or grant with or without conditions a permit under 85-2-311 or a change in appropriation right under 85-2-402 within 90 days after the administrative record is closed.

~~(2)~~(6) If an application is to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, any application approved by the department is subject to any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of the water applied for and any terms, conditions, and limitations related to the use of water contained in any special use authorization required by federal law.

~~(3)~~(7) Except as provided in subsection ~~(2)~~ (6), an application may not be denied or approved in a modified form or upon terms, conditions, or limitations specified by the department~~,~~ unless the applicant is first granted an opportunity to be heard. If an objection is not filed against the application but the department is of the opinion that the application should be denied or approved in a modified form or upon terms, conditions, or limitations specified by it, the department shall prepare a statement of its opinion and its reasons for the opinion. The department shall serve a statement of its opinion by first-class mail upon the applicant, with a notice that the applicant may obtain a hearing by filing a request within 30 days after the notice is mailed. The notice must further state that the application will be modified in a specified manner or denied unless a hearing is requested.

~~(4)~~(8) The department may cease action upon an application for a permit or change in appropriation right and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for either of these reasons must be accompanied by a statement of the reasons for which it was returned, and for a permit application there is not a right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection is a final decision of the department.

~~(5)~~(9) For all applications filed after July 1, 1973, the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use if:

(a) an application is not corrected and completed as required by 85-2-302;

(b) the appropriate filing fee is not paid;

(c) the application does not document:

(i) a beneficial use of water;

(ii) the proposed place of use of all water applied for;

(iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a detailed project plan describing when and how much water will be put to a beneficial use. The project plan must include a reasonable timeline for the completion of the project and the actual application of the water to a beneficial use.

(iv) for appropriations not covered in subsection ~~(4)(c)(iii)~~ (9)(c)(iii), a general project plan stating when and how much water will be put to a beneficial use; and

(v) if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:

(A) each person who will use the water and the amount of water each person will use;

(B) the proposed place of use of all water by each person;

(C) the nature of the relationship between the applicant and each person using the water; and

(D) each firm contractual agreement for the specified amount of water for each person using the water; or

(d) the appropriate environmental impact statement costs or fees, if any, are not paid as required by 85-2-124."

Section 6. Section 85-2-401, MCA, is amended to read:

"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July 1, 1973. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, ~~85-2-310(4)~~ 85-2-310(8), and 85-2-313.

(3) Priority of appropriation perfected before July 1, 1973, must be determined as provided in part 2 of this chapter.

(4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized and confirmed subject to this part and any terms, conditions, and limitations placed on a change in appropriation authorization by the department."

Section 7. Section 85-2-804, MCA, is amended to read:

"85-2-804. Application -- notice -- objections -- hearing. (1) Any appropriator proposing to divert from the basin water allocated to Montana under the terms of the compact or divert from the basin unallocated compact water within Montana shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana is for a beneficial use of water;

(b) the diversion and ultimate use of water will not adversely affect the water rights of other persons;

(c) the proposed means of diversion, construction, and operation are adequate;

(d) the diversion and ultimate use will not interfere unreasonably with other planned uses or developments for which a water right has been established or a permit has been issued or for which water has been reserved;

(e) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states;

(f) the diversion and ultimate use of the water are in the public interest of Montana; and

(g) the applicant intends to comply with the laws of the signatory states to the compact.

(2) Any appropriator proposing to divert from the basin water allocated to North Dakota or Wyoming under the terms of the compact or divert from the basin unallocated compact water within North Dakota or Wyoming shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the proposed means of diversion, construction, and operation are adequate;

(b) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states; and

(c) the applicant intends to comply with the compact.

(3) Notice of the proposed diversion must be given by the department in the same manner as provided in ~~subsections (1) and (2) of~~ 85-2-307(1) through (3).

(4) An objection to an application must be filed by the date specified by the department in the notice.

(5) The objector to an application under subsection (1) shall state his name and address and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana are not for a beneficial use of water;

(b) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;

(c) the proposed means of diversion, construction, and operation are not adequate;

(d) the diversion and ultimate use will interfere unreasonably with the objector's planned uses or development for which the objector has a water right, a permit, or a reserved water right;

(e) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state; or

(f) the diversion and ultimate use of the water are not in the public interest of Montana.

(6) The objector to an application under subsection (2) shall state his name and address and facts tending to show that:

(a) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;

(b) the proposed means of diversion, construction, and operation are not adequate; or

(c) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state.

(7) If the department receives an objection to an application, it shall hold a hearing on the application within 60 days from the date set by the department for filing objections. Service of notice of the hearing must be made by certified mail upon the applicant and the objector.

(8) The hearing shall be conducted under the contested case procedures of the Montana Administrative Procedure Act in Title 2, chapter 4, part 6."

- END -

_____ BILL NO. _____

INTRODUCED BY _____
(Primary Sponsor)

BY REQUEST OF THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING A GROUND WATER INVESTIGATION PROGRAM; PROVIDING FOR PRIORITIZATION OF SUBBASINS BY THE GROUND WATER ASSESSMENT STEERING COMMITTEE; ADDING A MEMBER OF THE DEVELOPMENT COMMUNITY TO THE GROUND WATER ASSESSMENT STEERING COMMITTEE; PROVIDING A CONTINGENT APPROPRIATION FOR THE PROGRAM; AMENDING SECTION 2-15-1523, MCA; AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Ground water investigation program -- advisory committee.** (1) The Montana bureau of mines and geology shall develop and implement a ground water investigation program for the purpose of collecting and compiling ground water and aquifer data. The program shall gather data, compile existing information, conduct field studies, and prepare a detailed hydrogeologic assessment report for each subbasin. The program shall develop a monitoring plan and a hydrogeologic model for each subbasin for which a report is prepared.

(2) The ground water assessment steering committee, established by 2-15-1523, shall prioritize subbasins for investigation based upon current and anticipated growth of agriculture, industry, housing, and commercial activity. Permit applications for the development of surface water or ground water and the timing of adjudication of water rights may be taken into account in prioritizing subbasins.

Section 2. Section 2-15-1523, MCA, is amended to read:

"2-15-1523. Ground water assessment steering committee. (1) There is a ground water assessment steering committee consisting of an employee of each of the following state agencies that have responsibility for ground water protection, management, or information. The member must be appointed by the head of the respective state agency:

(a) the department of natural resources and conservation;

(b) the department of environmental quality;

(c) the department of agriculture; and

(d) the Montana state library, natural resource information system.

(2) The ground water assessment steering committee may include representatives of the following agencies and units of government with expertise or management responsibility related to ground water and representatives of the organizations and groups specified in subsection (2)(h), who shall serve as ex officio members:

(a) the legislative services division;

(b) the board of oil and gas conservation;

(c) the Montana bureau of mines and geology;

(d) a unit of the university system, other than the Montana bureau of mines and geology, appointed by the board of regents of higher education for the Montana university system;

(e) a county government, appointed by an organization of Montana counties;

(f) a city, town, or city-county government, appointed by an organization of Montana cities and towns;

(g) each principal federal agency that has responsibility for ground water protection, management, or research, appointed by the Montana head of the respective federal agency; and

(h) one representative of each of the following, appointed by the governor:

(i) agricultural water users;

(ii) industrial water users; ~~and~~

(iii) a conservation or ecological protection organization; and

(iv) the development community.

(3) The ground water assessment steering committee shall elect a presiding officer from its voting members.

(4) The Montana bureau of mines and geology shall provide staff support to the committee."

NEW SECTION. **Section 3. Appropriation.** There is appropriated $4.2 million from the state general fund to the Montana bureau of mines and geology for developing and implementing the ground water investigation program described in [section 1].

NEW SECTION. **Section 4. Contingent voidness.** If House Bill No. 2 is passed and approved and if

it contains an appropriation of at least $4.2 million for the ground water investigation program described in [section 1], then [section 3] is void.

NEW SECTION. **Section 5. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 85, chapter 2, part 5, and the provisions of Title 85, chapter 2, part 5, apply to [section 1].

NEW SECTION. **Section 6. Effective date.** [This act] is effective July 1, 2009.

- END -

_____ BILL NO. _____

INTRODUCED BY _____
(Primary Sponsor)

BY REQUEST OF THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE ISSUANCE OF A CERTIFICATE OF WATER RIGHT FOR AQUATIC RESOURCE ACTIVITIES CARRIED OUT BY THE DEPARTMENT OF TRANSPORTATION IN COMPLIANCE WITH AND AS REQUIRED BY THE FEDERAL CLEAN WATER ACT OF 1977; AMENDING SECTIONS 85-2-102, 85-2-306, AND 85-2-360, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with 85-2-436;

(d) in the case of the United States department of agriculture, forest service:

(i) instream flows and in situ use of water created in 85-20-1401, Article V; or

(ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow to protect, maintain, or enhance streamflows in accordance with 85-2-320;

(e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(f) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; ~~or~~

(g) a use of water for an aquifer storage and recovery project as provided in 85-2-368; or

(h) in the case of the department of transportation, aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387, as provided in 85-2-306(9).

(2) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water.

(3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under 85-2-436;

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; ~~or~~

(f) a use of water for an aquifer storage and recovery project as provided in 85-2-368; or

(g) a use of water by the department of transportation for aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387, as provided in 85-2-306(9).

(5) "Certificate" means a certificate of water right issued by the department.

(6) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(7) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(8) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

(9) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(10) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(11) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(12) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(13) "Ground water" means any water that is beneath the ground surface.

(14) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(15) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water.

(16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

(17) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(18) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(19) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

(20) "Salvage" means to make water available for beneficial use from an existing valid appropriation

through application of water-saving methods.

(21) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(22) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(23) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(24) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(25) "Water division" means a drainage basin as defined in 3-7-102.

(26) "Water judge" means a judge as provided for in Title 3, chapter 7.

(27) "Water master" means a master as provided for in Title 3, chapter 7.

(28) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(29) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-306, MCA, is amended to read:

"85-2-306. Exceptions to permit requirements. (1) (a) Except as provided in ~~subsection~~ subsections (1)(b) and (9)(a), ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development works.

(b) If another person has rights in the ground water development works, water may be appropriated with the written consent of the person with those property rights or, if the ground water development works are on national forest system lands, with any prior written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the certificate.

(c) If the person does not have a possessory interest in the real property from which the ground water

may be appropriated, the person shall provide to the owner of the real property written notification of the works and the person's intent to appropriate ground water from the works. The written notification must be provided to the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice requirement only and does not create an easement in or over the real property where the ground water development works are located.

(2) Inside the boundaries of a controlled ground water area, ground water may be appropriated only:

(a) according to a permit received pursuant to 85-2-508; or

(b) according to the requirements of an order issued pursuant to 85-2-507.

(3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit.

(b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground water for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department through its offices.

(ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation is the date of refiling a correct and complete notice with the department.

(c) A certificate of water right may not be issued until a correct and complete notice has been filed with the department, including proof of landowner notification or a written federal special use authorization as necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

(4) An appropriator of ground water by means of a well or developed spring first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force

prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the filing of a notice, as provided in subsection (3), or the date of the filing of the claim of existing water right.

(5) An appropriation under subsection (4) is an existing right, and a permit is not required. However, the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, the department shall issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the adjudication proceedings provided for in 85-2-236.

(6) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:

(a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;

(b) the appropriation is less than 30 acre-feet a year;

(c) the appropriation is from a source other than a perennial flowing stream; and

(d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger.

(7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete application for a stock water provisional permit, the department shall automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators.

(b) If the impoundment or pit is on national forest system lands, an application is not correct and complete under this section until the applicant has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

(8) A person may also appropriate water without applying for or prior to receiving a permit under rules adopted by the department under 85-2-113.

(9) (a) The department of transportation is not required to obtain a permit before appropriating ground

water or diffuse surface water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387, if the appropriation is to restore a functional wetland with the intent to substantially replicate the predisturbance conditions by filling in or removing constructed ditches, drains, or similar structures that drained a historically functional wetland. The restored wetland must be designed to not exceed the size of the original wetland.

(b) (i) Within 30 days of completion of the appropriation for beneficial use, the department of transportation shall file a notice of completion with the department on a form provided by the department through its offices.

(ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation is the date of refiling a correct and complete notice with the department.

(iv) The certificate of water right must document the proposed number of applied-for credits attached to the wetland as assigned under the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387.

(c) A certificate of water right may not be issued until a correct and complete notice has been filed with the department, including proof that the aquatic resource activities were carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387, and proof of a possessory interest of the place of use. The original of the certificate must be sent to the department of transportation. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

(d) In order to define the nature and extent of the water right, the certificate of water right must state:

(i) the date of the priority of the right;

(ii) the purpose for which the water included in the right is used;

(iii) the place of use and description of the land to which the right is appurtenant;

(iv) the number of applied-for credits attached to the wetland as assigned under the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387, and certified to the department by the department of transportation.

(e) In addition to any remedy available to a certificate of water right holder, the issuance of a certificate

of water right under this subsection (9) entitles the department of transportation to protect the credits set forth in the certificate of water right against any appropriation of water in any subsequent permit or change authorization proceeding conducted under this chapter. Proof of the diminishment of credits is prima facie proof that water is not reasonably legally available under 85-2-311(1)(a)(ii) and of adverse effect under 85-2-402 in any proceeding conducted under this chapter.

(f) The purpose of a certificate of water right issued under this subsection (9) may not be changed."

Section 3. Section 85-2-360, MCA, is amended to read:

"85-2-360. Ground water appropriation right in closed basins. (1) An application, other than an application for the purposes of 85-2-306(9), for a ground water appropriation right in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or administratively closed pursuant to 85-2-319 must be accompanied by a hydrogeologic assessment that has been conducted pursuant to 85-2-361 to predict whether the proposed appropriation right will result in a net depletion of surface water and must be accompanied by a plan as provided in 85-2-362, if necessary.

(2) If the hydrogeologic assessment conducted pursuant to 85-2-361 predicts that the proposed appropriation right will not result in a net depletion of surface water, the department shall proceed under the criteria provided in 85-2-311.

(3) (a) If the hydrogeologic assessment predicts that the proposed appropriation right will result in a net depletion of surface water, the applicant shall analyze whether the net depletion results in an adverse effect on a prior appropriator. If the applicant provides a correct and complete application, the department shall proceed to process the application as provided in 85-2-363.

(b) If the applicant has used the water for the purpose of conducting the hydrogeologic assessment, the applicant shall terminate the use of the water. Failure to terminate use of the water must result in a fine of not more than $1,000 for each day of the violation.

(4) If the hydrogeologic assessment predicts that there will be net depletion as provided in subsection (3)(a), the department may proceed to process the application pursuant to 85-2-363 if, in addition to other applicable criteria, the applicant complies with 85-2-362.

(5) For the purposes of 85-2-360 through 85-2-362, the prediction of net depletion does not mean that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire amount of net depletion is the cause of the adverse effect. A determination of whether or not there is an adverse effect on

a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

(6) The priority date for an appropriation right that is granted to an entity whose permit application was returned after April 11, 2006, and before May 3, 2007, because of the department's interpretation of a court decision is the date of the initial application to the department."

NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

- END -

_____ BILL NO. _____

INTRODUCED BY _____
(Primary Sponsor)

BY REQUEST OF THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THAT A DISCHARGE PERMIT MUST BE OBTAINED, IF NECESSARY, FOR AN AQUIFER RECHARGE PLAN OR A MITIGATION PLAN IN A CLOSED BASIN; AND AMENDING SECTIONS 75-5-401, 75-5-410, 85-2-362, AND 85-2-364, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-5-401, MCA, is amended to read:

"75-5-401. Board rules for permits -- ground water exclusions. (1) Except as provided in subsection (5), the board shall adopt rules:

(a) governing application for permits to discharge sewage, industrial wastes, or other wastes into state waters, including rules requiring the filing of plans and specifications relating to the construction, modification, or operation of disposal systems;

(b) governing the issuance, denial, modification, or revocation of permits. The board may not require a permit for a water conveyance structure or for a natural spring if the water discharged to state waters does not contain industrial waste, sewage, or other wastes. Discharge to surface water of ground water that is not altered from its ambient quality does not constitute a discharge requiring a permit under this part if:

(i) the discharge does not contain industrial waste, sewage, or other wastes;

(ii) the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; and

(iii) to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters.

(c) governing authorization to discharge under a general permit for storm water associated with construction activity. These rules must allow an owner or operator to notify the department of the intent to be covered under the general permit. This notice of intent must include a signed pollution prevention plan that requires the applicant to implement best management practices in accordance with the general permit. The rules

must authorize the owner or operator to discharge under the general permit on receipt of the notice and plan by the department.

(2) The rules must allow the issuance or continuance of a permit only if the department finds that operation consistent with the limitations of the permit will not result in pollution of any state waters, except that the rules may allow the issuance of a temporary permit under which pollution may result if the department ensures that the permit contains a compliance schedule designed to meet all applicable effluent standards and water quality standards in the shortest reasonable period of time.

(3) The rules must provide that the department may revoke a permit if the department finds that the holder of the permit has violated its terms, unless the department also finds that the violation was accidental and unforeseeable and that the holder of the permit corrected the condition resulting in the violation as soon as was reasonably possible.

(4) The board may adopt rules governing reclamation of sites disturbed by construction, modification, or operation of permitted activities for which a bond is voluntarily filed by a permittee pursuant to 75-5-405, including rules for the establishment of criteria and procedures governing release of the bond or other surety and release of portions of a bond or other surety.

(5) Discharges of sewage, industrial wastes, or other wastes into state ground waters from the following activities or operations are not subject to the ground water permit requirements adopted under subsections (1) through (4):

(a) discharges or activities at wells injecting fluids associated with oil and gas exploration and production regulated under the federal underground injection control program;

(b) disposal by solid waste management systems licensed pursuant to 75-10-221;

(c) individuals disposing of their own normal household wastes on their own property;

(d) hazardous waste management facilities permitted pursuant to 75-10-406;

(e) water injection wells, reserve pits, and produced water pits used in oil and gas field operations and approved pursuant to Title 82, chapter 11;

(f) agricultural irrigation facilities;

(g) storm water disposal or storm water detention facilities;

(h) subsurface disposal systems for sanitary wastes serving individual residences;

(i) in situ mining of uranium facilities controlled under Title 82, chapter 4, part 2;

(j) mining operations subject to operating permits or exploration licenses in compliance with The Strip

and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, or the metal mine reclamation laws, Title 82, chapter 4, part 3; or

(k) projects reviewed under the provisions of the Montana Major Facility Siting Act, Title 75, chapter 20.

(6) Notwithstanding the provisions of 75-5-301(4), mixing zones for activities excluded from permit requirements under subsection (5) of this section must be established by the permitting agency for those activities in accordance with 75-5-301(4)(a) through (4)(c).

(7) Except for subsection (5)(h), the exemptions in subsection (5) do not apply to permits required pursuant to 75-5-410.

~~(7)~~(8) Notwithstanding the exclusions set forth in subsection (5), any excluded source that the department determines may be causing or is likely to cause violations of ground water quality standards may be required to submit monitoring information pursuant to 75-5-602.

~~(8)~~(9) The board may adopt rules identifying other activities or operations from which a discharge of sewage, industrial wastes, or other wastes into state ground waters is not subject to the ground water permit requirements adopted under subsections (1) through (4).

~~(9)~~(10) The board may adopt rules authorizing general permits for categories of point source discharges. The rules may authorize discharge upon issuance of an individual authorization by the department or upon receipt of a notice of intent to be covered under the general permit."

Section 2. Section 75-5-410, MCA, is amended to read:

"75-5-410. Water quality ~~of return flows and discharges associated with~~ requirements -- aquifer recharge ~~plan~~ or certain mitigation plans -- minimum requirements. (1) (a) Except as provided in subsection (1)(b), a ~~A~~ person who proposes ~~to use sewage from a system requiring a water quality permit for the purposes of aquifer recharge pursuant to 85-2-362 or plans to use sewage from a system requiring a water quality permit as a return flow to minimize the amount of water necessary to offset adverse effects resulting from net depletion of surface water through~~ an aquifer recharge or mitigation plan pursuant to 85-2-362 shall obtain, if necessary, a current permit pursuant to this chapter.

(b) The requirements of this section do not apply to the portion of a mitigation plan that consists of a change in appropriation rights for instream flow filed pursuant to 85-2-402.

(2) The minimum treatment requirements for sewage systems subject to this section are the federal requirements provided for in 40 CFR 133, and the system must meet, at a minimum, the requirements of level

two treatment for the removal of nitrogen in the effluent.

(3) In addition to the minimum treatment requirements of subsection (2), sewage systems subject to this section that are used for aquifer injection must meet the more stringent of either primary drinking water standards pursuant to Title 75, chapter 6, or the nondegradation requirements pursuant to 75-5-303 at the point of discharge.

(4) In addition to the minimum treatment requirements of subsection (2), sewage systems subject to this section that are used for aquifer recharge must meet either primary drinking water standards pursuant to Title 75, chapter 6, or the nondegradation requirements pursuant to 75-5-303 at the point of discharge.

~~(4) The appropriate interim legislative committee shall review drinking water standards and effluent treatment standards in other jurisdictions and recommend appropriate treatment standards for purposes of aquifer recharge and mitigation.~~

(5) For the purposes of this section, "aquifer injection" means the use of a well to inject water directly into an aquifer system without filtration through the geologic materials overlying the aquifer system for the purpose of aquifer recharge or for an aquifer storage and recovery project and "aquifer recharge" and "mitigation" have the meanings provided in 85-2-102."

Section 3. Section 85-2-362, MCA, is amended to read:

"**85-2-362. Aquifer recharge or mitigation plans in closed basins -- minimum requirements.** (1) An applicant whose hydrogeologic assessment conducted pursuant to 85-2-361 predicts that there will be a net depletion of surface water shall offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan.

(2) A mitigation plan must include:

(a) where and how the water in the plan will be put to beneficial use;

(b) when and where, generally, water reallocated through exchange or substitution will be required;

(c) the amount of water reallocated through exchange or substitution that is required;

(d) how the proposed project or beneficial use for which the mitigation plan is required will be operated;

(e) evidence that an application for a change in appropriation right, if necessary, has been submitted;

(f) evidence of water availability; ~~and~~

(g) evidence of how the mitigation plan will offset the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator; and

(h) evidence that the appropriate water quality permits have been granted pursuant to Title 75, chapter 5, as required by 75-5-410 and 85-2-364.

(3) An aquifer recharge plan must include:

(a) evidence that the appropriate water quality ~~related~~ permits have been granted pursuant to Title 75, chapter 5, ~~and pursuant to~~ as required by 75-5-410 and 85-2-364;

(b) where and how the water in the plan will be put to beneficial use;

(c) when and where, generally, water reallocated through exchange or substitution will be required;

(d) the amount of water reallocated through exchange or substitution that is required;

(e) how the proposed project or beneficial use for which the aquifer recharge plan is required will be operated;

(f) evidence that an application for a change in appropriation right, if necessary, has been submitted;

(g) a description of the process by which water will be reintroduced to the aquifer;

(h) evidence of water availability; and

(i) evidence of how the aquifer recharge plan will offset the required amount of net depletion of surface water in a manner that will offset any adverse effect on a prior appropriator.

(4) The department may not require an applicant, through a mitigation plan or an aquifer recharge plan, to provide more water than the quantity needed to offset the adverse effects on a prior appropriator caused by the net depletion.

(5) An appropriation right that relies on a mitigation plan or aquifer recharge plan to offset net depletion of surface water that results in an adverse effect on a prior appropriator must be issued as a conditional permit that requires that the mitigation plan or aquifer recharge plan must be exercised when the appropriation right is exercised."

Section 4. Section 85-2-364, MCA, is amended to read:

"85-2-364. Department permit coordination -- requirements for aquifer recharge or mitigation plans. To ensure that the department and the department of environmental quality are coordinating their respective permitting activities:

(1) an applicant for a new appropriation right pursuant to 85-2-360 that involves aquifer recharge or mitigation shall provide the department with a copy of a relevant discharge permit if necessary; and

(2) the department may not grant a new appropriation right pursuant to 85-2-360 that involves aquifer

recharge or mitigation until the discharge permit, if necessary, has been obtained and presented to the department."

- END -

SENATE BILL NO. 22

INTRODUCED BY T. MURPHY

BY REQUEST OF THE ENVIRONMENTAL QUALITY COUNCIL AND THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING THE WATER POLICY COMMITTEE; ALLOWING THE WATER POLICY COMMITTEE TO STUDY ANY ISSUE RELATED TO WATER POLICY; MODIFYING THE STATUTORY PROVISIONS REQUIRING THE ENVIRONMENTAL QUALITY COUNCIL TO STUDY WATER POLICY ISSUES; REQUIRING THE WATER POLICY COMMITTEE TO COORDINATE WITH THE ENVIRONMENTAL QUALITY COUNCIL AND ANY OTHER COMMITTEE TO AVOID DUPLICATION OF EFFORTS; AND AMENDING SECTIONS 5-5-202 AND 85-2-105, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Water policy committee.** There is a water policy committee. The committee is treated as an interim committee for the purposes of 5-5-211 through 5-5-214. The committee shall:

(1) determine which water policy issues it examines;

(2) conduct interim studies as assigned pursuant to 5-5-217;

(3) subject to the provisions of 5-5-202(4), coordinate with the environmental quality council and other interim committees to avoid duplication of efforts; and

(4) report its activities, findings, recommendations, and any proposed legislation as provided in 5-11-210.

Section 2. Section 5-5-202, MCA, is amended to read:

"5-5-202. Interim committees. (1) During an interim when the legislature is not in session, the committees listed in subsection (2) are the interim committees of the legislature. They are empowered to sit as committees and may act in their respective areas of responsibility. The functions of the legislative council, legislative audit committee, legislative finance committee, environmental quality council, water policy committee, and state-tribal relations committee are provided for in the statutes governing those committees.

(2) The following are the interim committees of the legislature:

(a) economic affairs committee;

(b) education and local government committee;

(c) children, families, health, and human services committee;

(d) law and justice committee;

(e) energy and telecommunications committee;

(f) revenue and transportation committee; and

(g) state administration and veterans' affairs committee.

(3) An interim committee or the environmental quality council may refer an issue to another committee that the referring committee determines to be more appropriate for the consideration of the issue. Upon the acceptance of the referred issue, the accepting committee shall consider the issue as if the issue were originally within its jurisdiction. If the committee that is referred an issue declines to accept the issue, the original committee retains jurisdiction.

(4) If there is a dispute between committees as to which committee has proper jurisdiction over a subject, the legislative council shall determine the most appropriate committee and assign the subject to that committee."

Section 3. Section 85-2-105, MCA, is amended to read:

"85-2-105. Environmental quality council -- water policy duties. (1) The environmental quality council shall meet as often as necessary, including during the interim between sessions, to perform the duties specified within this section.

(2) On a continuing basis, the environmental quality council ~~shall~~ may:

(a) advise the legislature on the adequacy of the state's water policy and on important state, regional, national, and international developments that affect Montana's water resources;

(b) oversee the policies and activities of the department, other state executive agencies, and other state institutions as those policies and activities affect the water resources of the state;

(c) assist with interagency coordination related to Montana's water resources; and

(d) communicate with the public on matters of water policy as well as the water resources of the state.

(3) On a regular basis, the environmental quality council shall:

(a) analyze and comment on the state water plan required by 85-1-203, when filed by the department;

(b) analyze and comment on the report of the status of the state's renewable resource grant and loan program required by 85-1-621, when filed by the department;

(c) analyze and comment on water-related research undertaken by any state agency, institution, college, or university;

(d) analyze, verify, and comment on the adequacy of and information contained in the water information system maintained by the natural resource information system under 90-15-305; and

(e) report to the legislature as provided in 5-11-210.

(4) The legislative services division shall provide staff assistance to the environmental quality council to carry out its water policy duties."

NEW SECTION. **Section 4. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 5, chapter 5, part 2, and the provisions of Title 5, chapter 5, part 2, apply to [section 1].

- END -

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